# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RMP CONSULTING GROUP, INC.; and RMP SERVICE GROUP, INC.,	ENTERED ON DOCKET
Plaintiffs, )	DATE 9-30 97
vs. )	Case No. 91-CV-295-H(J)
DATRONIC RENTAL CORPORATION,	
Defendant and ) Third Party Plaintiff, )	FILED
vs.	SEP 2 9 1997 (')
BANK OF OKLAHOMA, N.A.; ) and HENRY E. DOSS,	Phil Lombardi, Clerk U.S. DISTRICT COURT
Third Party Defendants	

#### REPORT AND RECOMMENDATION

Third Party Defendant, BANK OF OKLAHOMA ("BOK"), filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (doc. no. 191) all claims of Third Party Plaintiff, DATRONIC RENTAL CORPORATION ("Datronic"), against BOK asserting that there is no diversity of citizenship among the parties. Plaintiffs, RMP CONSULTING GROUP, INC. and RMP SERVICE GROUP, INC. (collectively referred to as "RMP"), and Third Party Defendant, HENRY E. DOSS ("Doss"), filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (doc. no. 190) all claims of Datronic against RMP and Doss asserting that there is no diversity of citizenship among the parties. By minute

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order dated March 4, 1997 both motions were referred to the undersigned for Report and Recommendation and they are now ready for decision.

The jurisdictional basis for Datronic's claims is diversity of citizenship under 28 U.S.C. § 1332. At all relevant times, Datronic was the general partner of Datronic Equipment Income Fund XVI, L.P. ("the Fund"). If the citizenship of the Fund's limited partners must be considered, diversity of citizenship in this case is destroyed because certain of the Fund's limited partners are citizens of the same state as BOK, RMP and Doss. In their current motions for summary judgment, BOK, RMP and Doss argue that the citizenship of the Fund's limited partners must be considered because the Fund is an indispensable party under Fed. R. Civ. P. 17 and 19. For the reasons discussed below, the undersigned finds that the Fund is not an indispensable party under Rules 17 and 19. Nevertheless, because the undersigned finds that the Fund was substantially involved in the claims of this lawsuit, the citizenship of its limited partners must be considered. Consequently, the undersigned recommends that BOK's, RMP's and Doss' motions to dismiss for lack of subject matter jurisdiction be GRANTED.

#### I. STATEMENT OF FACTS

During 1987 through 1989 Datronic acquired in its own name 80 copier leases and underlying copier equipment from CopyTech Systems, Inc. At the time of these purchases, Datronic was the general partner of the Fund. The relationship between

Datronic and the Fund is best described in the affidavit of former Datronic employee Kenneth B. Drost, the pertinent parts of which are as follows:

- 1. The Fund was formed as a Delaware limited partnership on April 21, 1987.
- 2. From April 21, 1987 through March 4, 1993, Datronic was the general partner of the Fund.
- 3. Datronic was authorized by the Fund to make contracts, receive money, file suits and other actions in its own name on behalf of the Fund.
- 4. Between October 7, 1987 and February 28, 1988, consistent with its customary practice when acquiring equipment leases on behalf of the Fund, Datronic acquired in its own name, but for the benefit of the Fund, 80 copier leases and equipment which are the subject of this lawsuit.
- 5. In acquiring the aforesaid 80 leases and equipment, Datronic used only the funds of the Fund.
- At no time did Datronic need to assign its rights under any of the leases and bills of sale to the Fund because the ownership of the leases and equipment by Fund was at all times reflected in the accounting books and records of Datronic and the Fund.
- 7. Transactions involving the 80 leases, notwithstanding the use of Datronic's name, were credited to or debited to the account of the Fund. Fore example, payments made to Datronic were deposited in accounts held in the name of the Fund.
- 8. Filings pursuant to the Uniform Commercial Code were made with state authorities under the name of the Fund to reflect the ownership of the leases and equipment by the Fund.
- Datronic purchased and owned the leases and equipment in its own name but as general partner and agent for and on behalf of the Fund.

The affidavit is attached by Datronic to its response to Motions for Summary Judgment, dated August 1, 1996 and filed on August 8, 1996. [Doc. No. 167].

In April 1991, RMP sued Datronic seeking declaratory judgment that RMP was the true owner of the CopyTech leases. On May 1, 1991 Datronic filed a Notice of Removal alleging diversity jurisdiction. Datronic filed an Answer and Counterclaim alleging that Datronic owned the CopyTech leases and alleging that RMP had interfered with or converted the CopyTech leases. In January 1992, Datronic filed a Third Party Petition against BOK and Doss alleging diversity jurisdiction and claiming BOK and Doss had interfered with or converted the CopyTech leases in 1990 and 1991.

BOK alleges it first learned from depositions of two former Datronic employees in June 1996 that the CopyTech leases had been owned by the Fund since their acquisition in 1987 and 1988. During those same depositions, BOK also learned that Datronic had been removed as general partner of the Fund on March 4, 1993 by an Illinois federal court order. The Lease Resolution Corporation replaced Datronic as general partner and it continues in that capacity today. Datronic was dissolved in September 1993.

On July 15, 1996 BOK filed a Motion for Summary Judgment (doc no. 163) asserting that Datronic was not the real party in interest. (This motion is still pending and is not the subject of this order.) Datronic responded by claiming that the Fund should be substituted as the real party in interest or should be allowed to ratify Datronic's actions in this lawsuit. On August 8, 1996 the Fund filed a Certificate of Ratification in which the Fund did "ratify and authorize the commencement, prosection and continuation of this action . . . in the name of Datronic Rental Corporation for our

benefit. We agree to be bound by the final determination and results in this case." [Doc. No. 169].

Datronic filed on February 7, 1997 and February 26, 1997 stipulations that the Fund has limited partners that are citizens of Oklahoma and Missouri. BOK is a national banking association with its principal place of business in Oklahoma. Doss is a citizen of Oklahoma. The RMP plaintiffs are Missouri corporations with their principal places of business in Oklahoma. On February 10, 1996 and February 11, 1996, BOK, RMP and Doss filed their Motions to Dismiss for Lack of Subject Matter Jurisdiction (doc. nos. 190 and 191) asserting no diversity of citizenship among the parties. These February 1996 motions are the subject of this Report and Recommendation.

#### II. DISCUSSION

## A. Federal Court Jurisdiction may be Challenged at Any Time.

Subject matter jurisdiction may be challenged at any time and objections to such jurisdiction cannot be waived. Laughlin v. K-mart Corp., 50 F.3d 871 (10th Cir. 1995). An action must be dismissed when it becomes apparent that subject matter jurisdiction is lacking. Penteco Corp. Ltd. Partnership-1985A v. Union Gas System. Inc., 929 F.2d 1519, 1521 (10th Cir. 1991). See Fed. R. Civ. P. 12(h)(3):

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

See also Mansfield. Coldwater & Lake Michigan Rv. v. Swan, 111 U.S. 379, 382 (1884):

The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception which requires this court . . . to deny its own jurisdiction, and . . . that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which . . . it is called to act.

## B. Datronic and the Fund Are Real Parties in Interest.

Rule 17 of the Federal Rules of Civil Procedure provides:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. R. Civ. P. 17(a).

Under the above rule, Datronic is a real party in interest because the leases acquired by Datronic were "contracts... made for the benefit of another." A general partner is vested with the right to bring and control litigation and is a real party in interest who "may bring the suit in his own name without joining the parties for whose

benefit it is brought." <u>Boeing Airplane Co. v. Perry</u>, 322 F.2d 589, 591 (10th Cir. 1963). BOK has presented no evidence or law indicating that removal of Datronic as a general partner of the Fund or dissolution of Datronic has divested Datronic of its right to proceed as a party to this lawsuit.

Even if Datronic were not a real party in interest, a real party in interest (the Fund) has ratified Datronic's actions as permitted under Rule 17(a). See Icon Group. Inc. v. Mahogany Run Development Corp.. 829 F.2d 473, 477 (3rd Cir. 1987) (holding that a real party in interest may ratify the actions of its agent without being joined). Datronic has satisfied the real party in interest requirements of Rule 17(a).

The facts set forth in the affidavit of Kenneth Drost, excerpted above, make it clear that the Fund is also a real party in interest. However, there is nothing in Rule 17(a) that compels its joinder as a party plaintiff.

### C. The Fund is not an Indispensable Party.

Rule 19 of Federal Rules of Civil Procedure provides:

- (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if
- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

- (i) as a practical matter impair or impede the person's ability to protect that interest or
- (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
- Determination by Court Whenever Joinder not (b) Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(a) and (b).

The parties disagree on the proper interpretation of Rule 19. BOK argues that if joinder of the Fund would destroy diversity and "deprive the court of jurisdiction over the subject matter," the considerations of Rule 19(a) are inapplicable and you must look only to the considerations of Rule 19(b). Datronic argues Rule 19(b) considerations are made only if the court first determines that the Fund is an indispensable party under Rule 19(a) and joinder would deprive the court of jurisdiction. The undersigned agrees that if joinder is not required under Rule 19(a),

the Court may proceed without joinder and the Court is not required to evaluate the applicability of Rule 19(b). See, e.g., Snap-On Tools Corp. v. Mason, 18 F.3d 1261 (5th Cir. 1994).

Therefore, the Court must look first to see if the Fund is an indispensable party under Rule 19(a). A review of Rule 19(a)'s requirements establishes that the Fund is not an indispensable party and joinder is not required. Complete relief can be "accorded among those already parties" because the general partner is a real party in interest and the Fund is bound by all proceedings herein. The Tenth Circuit Court of Appeals and other circuits have so held with facts similar to this case. "Although the profits from the project may have been intended to go to the limited partnership," it was not error to allow the general partners to pursue the lawsuit in their own names. Zimmerman v, First Federal Sav. & Loan Ass'n, 848 F.2d 1047, 1056 (10th Cir. 1988). See also Smith v, Mandel, 66 F.R.D. 405 (D.S.C. 1975).

At first glance, this interpretation appears to create an anomaly. If the Fund is found to be a necessary party under Rule 19(a), then Rule 19(b) would allow the court to retain jurisdiction and proceed (as urged by Datronic). If the Fund is not a necessary party, the Court does not reach the discretion of 19(b), and the case must be dismissed. Finding that the Fund is an unnamed necessary party allows the court to retain jurisdiction. Finding that the fund is an unnamed, unnecessary party requires the case to be dismissed for no jurisdiction --- truly an anomalous result. A second look reveals that whether the Fund is a necessary party or not and whether you end up in Rule 19(a) or Rule 19(b), the citizenship of the Fund must be considered and the

case dismissed. Rule 19(b) does not give the Court the discretion to proceed where there is no underlying subject matter jurisdiction.

The parties urge various parts of Rules 17 and 19 to support their positions. There is nothing in either rule that compels the court's decision either direction. Nevertheless, counsel's efforts are not in vain. Sometimes we need to look at what does not apply to see what does apply. In the visual arts, the negative space (the background) helps us see the positive (the image). In this case, Rules 17 and 19 are negative space. Real party in interest concerns raised by Rule 17 do not determine the real party in interest for diversity jurisdiction purposes.

There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases.

Navarro, 446 U.S. at 463, n. 9. Rule 82 confirms that "[the Federal Rules of Civil Procedure] shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

BOK relies on New York Life Insurance Company v. Ramco Holding Corporation, 938 F. Supp. 754 (N.D. Okla. 1996) and Bankston v. Burch, 27 F.3d 164 (5th Cir. 1994). In both cases a limited partner filed a classic derivative action. That is, the limited partners in Bankston and Ramco, brought actions on behalf of their limited partnerships which the limited partnerships refused or failed to bring. Both courts found that the limited partnerships were indispensable parties that had to be joined. This case is not a derivative action in which a limited partner is suing to enforce the

rights of the partnership and the limited partnership is not an indispensable party for the reasons discussed above.

# D. The Citizenship of Limited Partnership is Determined by The Citizenship of Its Limited Partners.

The United States Supreme Court has definitively held (unless a 5-4 decision is considered indefinite) that where a Limited Partnership is a party to an action the citizenship of each of its limited partners must be considered to determine whether the parties' citizenship is diverse. Carden v. Arkoma Assoc., 494 U.S. 185 (1990). In Carden an Arizona limited partnership was the named plaintiff in a diversity action. Justice Scalia's majority opinion adhered to the court's,

oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members,' Chapman v. Barney, 129 U.S. 677, 682 (1889), 'the several persons composing such association,' Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900)[, and] 'each of its members,' Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 151 (1965).

Id. at 195-196. Any modification to this rule is "performed more legitimately by Congress than by the courts." Id. at 197.

The dissent in <u>Carden</u>, authored by Justice O'Connor, uses the "real party to the controversy" test and argues that only the citizenship of those parties that are real parties to the controversy should be considered, citing <u>Navarro Savings Ass'n. v. Lee</u>, 446 U.S. 458 (1980). In <u>Navarro</u>, on which Datronic relies in this case, the Court held that the citizenship of business trust beneficiaries should not be considered in diversity determinations because those trust beneficiaries were not real parties to the

controversy because they lacked both control over the conduct of the business and the ability to initiate or control the course of litigation. The <u>Carden</u> dissent argued that application of <u>Navarro's</u> real-party-to-the-controversy test to limited partnerships yields the conclusion that limited partners should not be considered for diversity considerations.

Carden does not directly determine this case because of one major distinction. In <u>Carden</u> the limited partnership was a named party to the lawsuit. The Court took great care to say that when a suit is brought by a limited partnership the citizenship of each limited partner must be considered. In this case the limited partnership is not a named party and, as discussed above, is not an indispensable party that must be joined.

# E. The Citizenship of Each Limited Partner of The Fund Must be Considered for Diversity Purposes.

Having discussed the relevant and not-so-relevant positions urged by the parties, the determining question appears. Must the Court consider for diversity purposes the citizenship of a limited partnership, the Fund, which is a real party in interest but is not a named party and need not be named because Fed. R. Civ. P. 17 allows suit by one for the benefit of another and allows ratification and because Fed. R. Civ. P. 19(a) finds the Fund not to be an indispensable party? This undersigned recommends that this question be answered yes. Once the Court decides that the citizenship of the Fund must be considered, then <u>Carden</u> says you must consider the citizenship of each

limited partner. There is nothing in <u>Carden</u> that compels the first decision. That is required by <u>Navarro</u>.

In <u>Navarro</u> the plaintiffs were eight individual trustees of a Massachusetts business trust, suing in their own names. The defendant disputed the existence of complete diversity claiming that the trust beneficiaries, rather than the trustees, were the real parties to the controversy and the citizenship of the trust beneficiaries should control. The court rejected defendant's argument and reaffirmed the following rule:

Federal Courts have jurisdiction over controversies between 'Citizens of different States' by virtue of 28 U.S.C. § 1332(a)(1) and U.S. Const., Art. III, § 2. Early in its history, this court established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Navarro, 446 U.S. at 460-61.

Application of the general rule, reaffirmed in Navarro, to this case compels the conclusion that the Fund is a real and substantial party to this controversy and that the citizenship of the Fund must be considered for diversity determinations. The affidavit of Kenneth Drost, as excerpted in the Statement of Facts, reveals the Fund to be the actual owner of the assets and the claims central to this litigation, even though the leases were acquired in Datronic's name. Deposition testimony by Datronic

representatives and the Fund's ratification all indicate Datronic's position as an agent or conduit and the Fund's active participation throughout.<sup>1/</sup>

Curiously, all parties to this case have cited Navarro in support of their position. The Court in Navarro found the trust beneficiaries were not substantial parties to the controversy because they lacked control over the conduct of the business and the ability to initiate or control the course of the litigation. Thus, the citizenship of trust beneficiaries need not be considered to determine diversity. Citing Navarro, Datronic argues that limited partners are not substantial parties to the controversy, and their citizenship should be ignored. Unfortunately for Datronic, what Navarro giveth, Carden taketh away. It is Navarro that tells us we must consider the citizenship of the Fund because it is a real party to the controversy. Even the dissent in Carden would agree with that. Then the Carden majority holds that to determine the citizenship of the Fund we must consider the citizenship of each limited partner. The Carden dissent would disagree with this step. Datronic argues even if the Fund is a real and substantial party, its limited partners are not, so the limited partners' citizenship should not be considered. This is the position of the Carden dissent. That door has been closed by Justice Scalia and the Carden majority.

Rule 17 states that ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." If this action had been commenced in the name of the Fund, there would be no diversity jurisdiction. The

<sup>1/</sup> The Court is free to consider affidavits and other materials to determine jurisdictional facts. See New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995).

Fund argues that it may ratify the proceedings to satisfy Rule 17(and has done so), but that its citizenship is not to be considered for diversity jurisdiction determination. The Fund should not be permitted to argue that it is substantial enough that its ratification is necessary to proceed, but it is not substantial enough that its citizenship must be considered for diversity purposes. It appears to the court that the goose and the gander are not being equally sauced as they try to have their cake and eat it too. The opportunities for manipulation of the process by litigants seeking or avoiding diversity jurisdiction are obvious. The limited partnership plaintiff could generate or avoid federal jurisdiction by filing in its own name or the name of its general partner as it chooses. See Prosperity Reality, Inc. v. Haco-Cannon, 724 F. Supp. 254 (S.D.N.Y. 1989).

In <u>Hallern v. Hoffman</u>, 966 F.2d 45 (1st Cir 1992), a general partner sued in his own name on behalf of a limited partnership. The general partner relied on his own diversity with the defendant to support jurisdiction. The court disagreed. Even though applicable state law required the suit to be brought in the partner's name, the claims were owned by the limited partnership and diversity had to exist between the defendant and all limited partners.

In this case, there can be no doubt that suit was brought for and on behalf of [the limited partnership] . . . . Consequently, the citizenship of [the limited partnership] --- which is all of its general and limited partners --- must be considered in determining whether there is diversity jurisdiction. To hold otherwise would make the rule of Carden, and the existence of diversity jurisdiction, turn on the sheer fortuity of state law relating to the name or names under which a limited partnership must sue. Those

partnerships in states adhering to the old common law rule would have superior access to diversity jurisdiction and those elsewhere might seek to create diversity jurisdiction simply by not availing themselves of the right to sue in the partnership name.

Hallern, 966 F.2d at 48. See also Airlines Reporting Corp. v. S&N Travel, Inc., 58 F.3d 857 (2d Cir. 1995); Robin Realty & Management Company v. Karosen, No. 91-C-4640, 1992 WL 281343 (N.D. III. Oct. 5, 1992); Stouffer Corp. v. Breckenridge, 859 F.2d 75 (8th Cir. 1988); Carlsberg Resources Corp. v. Cabria Savings and Loan Ass'n, 554 F.2d 1254 (3d Cir. 1977).

Datronic argues that diversity jurisdiction is not defeated by joining the Fund as a party plaintiff or ratification by the Fund because of the general rule that diversity jurisdiction is not defeated by addition of non-diverse parties to the action as long as the added party was not indispensable at the time the complaint was filed. Datronic cites <a href="Freeport-McMoRan">Freeport-McMoRan</a>. Inc. v. K N Energy. Inc., 498 U.S. 426 (1991) which confirms the general rule that diversity is assessed at the time the action is filed and subsequent joinder of a non-diverse party will not cause the court to lose jurisdiction. However, in <a href="Freeport">Freeport</a> proper diversity jurisdiction did exist at the time the complaint was filed. After the suit was filed the plaintiff assigned its contract rights to a limited partnership and added the limited partnership as a party plaintiff. In this case, diversity among the parties did not exist when the case was filed since the citizenship of the Fund should have considered from the initial filing.

#### III. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** the Motion to Dismiss for Lack of Subject Matter Jurisdiction filed on behalf of BOK (doc. no. 191) and on behalf of RMP and Doss (doc. no. 190) because there is no diversity of citizenship among the parties. To hold otherwise would allow any limited partnership to create or destroy federal jurisdiction depending on whether they filed suit in the name of their general partner or the limited partnership.

Any objection to this Report and Recommendation must be filed with the Court Clerk within ten days of being served with a copy of this Report and Recommendation. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 29 day of September 1997.

Sam A. Joyner

United States Magistrate Judge

#### CERTIFICATE O. SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

pay of September 1397

# UNITED STATES DISTRICT COURT FOR THE I LED

SEP 2 9 1997

DARRYLE LAWRENCE WILLIAMS,	Phil Lombardi, Cler
Petitioner,	)
vs.	Case No. 96-C-760-K(J)
RONALD J. CHAMPION	)
Respondent.	ENTERED ON DOCKET
	DATE 9-31-97

#### **REPORT & RECOMMENDATION**

Petitioner filed a Petition for a Writ of Habeas Corpus on August 20, 1996. [Doc. No.1-1]. Respondent's response was filed on October 17, 1996. [Doc. No. 7-1]. By minute order dated December 31, 1996, this action was referred to the undersigned magistrate judge for all further proceedings in accordance with his jurisdiction.

#### PROCEDURAL AND FACTUAL HISTORY

Petitioner pled guilty to charges of kidnapping (sentenced 25 years), lewd molestation (sentenced 5-20 years), forcible sodomy (sentenced 10 years), and assault with intent to rape (sentenced 6-10 years). Petitioner was informed by the trial court at his sentencing that to appeal from his conviction on a guilty plea he must file a motion to withdraw his plea of guilty within ten days and request an evidentiary hearing before the trial court. [Doc. No. 8-1, at 6-7].

Petitioner asserts that he sent a note to the public defender who served as his defense counsel two days after entering his plea of guilty and requested that his



defense counsel visit him to discuss the withdrawal of his guilty plea. According to Petitioner, the public defender's office never contacted him, and on October 16, 1992 (four days after he was sentenced), Petitioner was transported to the Lexington Assessment & Reception Center, a facility within the Oklahoma Department of Corrections. Petitioner states that he sent a "second" letter to the public defender on October 28, 1992. In response to his second letter, Petitioner received a response from Ms. Denny Johnson, an assistant public defender. Ms. Johnson informed Petitioner that the deadline for perfecting his appeal had passed because he had only ten days from the date of his plea of guilty within which to file a motion to withdraw the plea.

Petitioner filed a motion to withdraw his guilty plea in the trial court. The trial court denied the motion because it was not timely filed. Petitioner filed a Petition for a Writ of Certiorari with the Oklahoma Court of Criminal Appeals. On September 2, 1993, the Court denied the Writ and informed Petitioner that he should have filed a request for an appeal out of time in the trial court.

On October 27, 1993, Petitioner filed an Application for Post-Conviction Relief for an Appeal out of time in the Tulsa County District Court. Petitioner asserted that he was denied an appeal due to the fault of his trial counsel, and that the trial court erred in accepting a guilty plea because no factual basis for the entry of a guilty plea had been pled. On December 14, 1994, the trial court denied Petitioner's motion. The trial court concluded that nothing supported Petitioner's claim that he was improperly denied an appeal due to the fault of his counsel. The trial court noted that Petitioner's

attorney stated that the only letter she located from Petitioner, after searching her files, was dated October 28, 1992. The trial court found that Petitioner was adequately informed of his right to appeal, but that Petitioner made no attempts to appeal during the ten days after he entered his plea of guilty. The trial court additionally found that Petitioner had voluntarily and knowingly entered a plea of guilty.

Petitioner filed a Petition in Error in the Oklahoma Court of Criminal Appeals on March 14, 1994. On April 3, 1994, the Oklahoma Court of Criminal Appeals entered an Order affirming the denial by the trial court of post-conviction relief. The Court noted that the "only support [for Petitioner's arguments] consisted of [Petitioner's] self-serving statements. Further, the attorney who represented Petitioner at the hearing where he pled guilty executed a sworn affidavit attesting that, after searching her files, the only letter she found from Appellant with respect to filing an appeal was dated October 28, 1992. Petitioner's attorney stated that she responded to Petitioner by letter and informed him that it was too late to file an appeal because Petitioner should have, if he wanted to appeal, filed a motion to withdraw his guilty plea within ten days from the date of his plea. The Court concluded that the Petitioner did not offer a sufficient reason for his failure to perfect a statutory direct appeal, and therefore Petitioner had waived his right to assert the issues he was attempting to raise.

#### **ANALYSIS**

Petitioner raises two issues. Petitioner asserts that: (1) he was denied due process of law in violation of the Sixth and Fourteenth Amendments when the State of Oklahoma denied him a direct appeal through no fault of his own, and (2) he was denied due process of law and effective assistance of counsel.

## SIXTH & FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

#### **Exhaustion and State Remedies**

Federal courts are prohibited from granting applications for a writ of habeas corpus unless a petitioner meets the requirements of 28 U.S.C. § 2254(b) and (c). To satisfy these statutory requirements, a petitioner must show that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition, or (c) circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b). See also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

The Order of the Oklahoma Court of Criminal Appeals reflects that this first issue was addressed by the Oklahoma Court, and has therefore been exhausted.

#### **Due Process -- Right to Appeal**

Petitioner asserts that he contacted his attorney within ten days of the entry of Petitioner's guilty plea, but that his attorney failed to file an appeal. Petitioner claims that he asked for an appeal out-of-time because his failure to appeal was not due to

any fault on behalf of Petitioner. However, Petitioner states that he was denied the right to appeal out-of-time and was therefore denied his right to due process.

Petitioner has no constitutional right to an appeal of a criminal conviction. <u>See McKane v. Durston</u>, 153 U.S. 684, 687 (1894). However, when a state has an appellate process, that process must comply with the dictates of due process. <u>See Evitts v. Lucey</u>, 469 U.S. 387, 393 (1985); <u>Olson v. Hart</u>, 965 F.2d 940 (10th Cir. 1992). Under the federal constitution, Petitioner has a right not to be denied an appeal due to arbitrary or capricious actions. <u>Pruneyard Shopping Center v. Robins</u>, 447 U.S. 74, 85 (1980); <u>United States ex rel. Payton v. Rundle</u>, 472 F.2d 36, 40 (3rd Cir. 1972); <u>Olson v. Hart</u>, 965 F.2d 940 (10th Cir. 1992).

In this case, the state trial court and the Oklahoma Court of Criminal Appeals concluded that Petitioner failed to comply with the appropriate procedures for appealing a guilty plea. Oklahoma court rules require that "[i]n all cases, to appeal from any conviction on a plea of guilty . . . the defendant must have filed in the trial court clerk's office an application to withdraw the plea within ten days from the date of the pronouncement of the Judgment and Sentence . . . " See Rules of the Court of Criminal Appeals, Rule 4.2. Petitioner acknowledges that he did not file an application to withdraw his guilty plea within this requisite time period. Petitioner did not comply with the procedural requirements governing his appeal rights, and the state courts concluded that Petitioner had failed to properly preserve his right to appeal his conviction. Such a conclusion is based on state procedural law; is not arbitrary or capricious; and does not violate the due process clause.

Petitioner additionally asserts that he attempted to contact his attorney prior to the expiration of the ten days following the entry of his guilty plea but that his attorney never responded to his letter. This argument is addressed below.

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Petitioner's second argument is that he was denied effective assistance of counsel. In the explanation of his argument, Petitioner notes that although he pled guilty, he sent a letter to his court-appointed attorney, within two days of his plea, stating that he wanted to withdraw his guilty plea. Petitioner states that his court-appointed attorney never contacted him. Consequently, Petitioner asserts that he was deprived of effective assistance of trial counsel.

#### Exhaustion/State Remedies

The Order of the Oklahoma Court of Criminal Appeals indicates that the Oklahoma Court addressed this issue. See [Doc. No. 7-1, Exhibit "E"]. Petitioner therefore exhausted his claim of ineffective assistance of appellate counsel.

#### Ineffective Assistance of Appellate Counsel

Petitioner relies on <u>Baker v. Kaiser</u>, 929 F.2d 1495 (10th Cir. 1991), and asserts that his trial counsel had a duty to visit him at the jail during the ten-day period after the entry by Petitioner of a guilty plea. Petitioner's reliance is misplaced. In <u>Baker</u> the defendant was convicted following a jury trial. The Tenth Circuit concluded that counsel had a duty to "explain the advantages and disadvantages of an appeal[,] . . . provide the defendant with advice about whether there are meritorious grounds

for appeal and about the probabilities of success [and] . . . inquire whether the defendant wants to appeal the conviction." <u>Id.</u> at 1499. <u>Baker</u> addresses counsel's duties to his client following a jury trial and conviction. <u>Baker</u> does not specifically address a counsel's duties when a client pleads guilty.

The Tenth Circuit has consistently held that when a guilty plea is the basis for a judgment, special considerations apply. In Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989), the Court concluded that counsel has a duty to inform a defendant who has plead guilty about his right to appeal if the defendant asks about the right or if a claim of error is made on constitutional grounds that could result in setting aside the plea. This duty arises when counsel knows or should have learned of the claim or the facts underlying the claim. Baker is limited to only those situations in which a defendant's conviction follows a jury trial. Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992). See also Castellanos v. United States, 26 F.3d 717, 719 (7th Cir. 1994); Carey v. Leverette, 605 F.2d 745, 746 (4th Cir. 1979). 17

Consequently, the Court declines to apply <u>Baker</u> because Petitioner pled guilty.

However, in accordance with <u>Laycock</u>, counsel was required to inform Petitioner about

<sup>1/</sup> Baker was decided after Laycock. However, in numerous unpublished cases decided after Baker, the Tenth Circuit has declined to extend all of the requirements of Baker to cases in which a defendant pled guilty and subsequently argued that counsel was ineffective with respect to the defendant's appeal. See, e.g., Gardner v, Cody, 105 F.3d 669 (10th Cir. Jan. 6, 1997) 1997 WL 3388; Adair v. Cody, 89 F.3d 849 (10th Cir. June 4, 1996) 1996 WL 293830; Matlock v. Carr, 74 F.3d 1249 (10th Cir. Jan. 17, 1996) 1996 WL 15670; Glasper v. Tulsa County, 67 F.3d 312 (10th Cir. Sept. 26, 1995) 1995 WL 578983; Briggs v. Carr, 53 F.3d 342 (10th Cir. May 1, 1995) 1995 WL 250796 (no evidence other than petitioner's own allegations that he attempted to contact his attorney); Shaw v. Cody, 46 F.3d 1152 (10th Cir. Jan. 20, 1995) 1995 WL 20425; Orange v. Cody, 21 F.3d 1122 (10th Cir. April 15, 1994) 1994 WL 131750 (petitioner claimed he sent a letter to his counsel requesting that counsel file an appeal);

his rights to appeal if Petitioner asked about the right or if a claim of error is made on constitutional grounds that could result in setting aside the plea.

The state court record reveals that Petitioner was informed by the trial court of his right to appeal.

THE COURT: Here's your right to appeal. You have the right to file a petition in the Court of Criminal Appeals for a Writ of Certiorari. This is a request for that court to review this judgment and sentence. It may be granted or denied. Do you understand that?

MR. WILLIAMS: Yes.

THE COURT: To appeal from this conviction on your plea of guilty, you must file an application to withdraw the plea of guilty within 10 days from today setting forth in detail the grounds for such withdrawal of the plea and requesting an evidentiary hearing in the trial court. Said trial court must hold said evidentiary hearing and deny said application within 30 days from the filing of the same. No question may be raised in the petition for Writ of Certiorari which requires an evidentiary hearing unless the same has been raised in the application to withdraw plea in the trial court and a hearing held thereon. Do you understand that?

MR. WILLIAMS: (Nods head up and down.)

THE COURT: Petition for Writ of Certiorari must be filed in the Court of Criminal Appeals within 90 days from today.

If you want to appeal, your attorney Ms. Johnson would represent you but you'll have to notify her. Do you understand that?

MR. WILLIAMS: Yes.

THE COURT: Any questions?

MR. WILLIAMS: No.

[Doc. No. 8-1, Transcript of Proceedings in the District Court for Tulsa County, dated October 12, 1992]. Petitioner was therefore informed of his limited right to appeal by the state court. In addition, although Petitioner was asked if he wanted to wait ten days before being transported to the state penitentiary, Petitioner requested immediate transportation. [Doc. No. 8-1, Transcript of Proceedings in the District Court for Tulsa County, dated October 12, 1992].

Petitioner claims that two days after he was sentenced, on October 12, 1992, he sent a note to his defense counsel requesting that she visit him in the Tulsa County Jail to discuss the withdrawal of his guilty plea. Petitioner states that on October 14, 1992, he was transported to the Lexington Assessment & Reception Center where he was held for five to seven days, and was prohibited from outside communication. Petitioner asserts that on October 28, 1992 he sent a second letter to the Tulsa County Public Defender's Office. Petitioner, in his brief, states that "This letter was written in reference to the first letter; as, Petitioner was wanting to know why he wasn't contacted about withdrawing his plea of guilty." [Doc. No. 12-1, Petitioner's Brief at 2]. Petitioner's "second letter" states:

I'm writing this letter to let you know I want you to file an appeal. I feel you have enough information to get one started. I'll send you my address of destination when I get there. I've talked to a law clerk here at Lexington. And he feels I have enough grounds for an appeal. I will send more information as I study and talk with other law clerks where ever [sic] I may be. If you have any more information, Please [sic] send it to me. Your cooperation will be greatly appreciated.

The letter is dated October 28, 1992. The letter makes no reference to Petitioner's "first" letter, and does not inquire as to why Petitioner had not already been contacted about filing an appeal.

Petitioner filed a Motion to Withdraw his Guilty Plea approximately two and one-half months after he entered the plea. The trial court denied the motion as untimely. The Oklahoma Court of Criminal Appeals denied Petitioner's Writ of Certiorari on September 2, 1993, instructing Petitioner on the appropriate procedure for him to follow to request a direct appeal out-of-time. On October 27, 1993, Petitioner filed an Application for Post Conviction Relief in the trial court. Petitioner claimed that he wrote a letter to his attorney on October 14, 1992, requesting instruction with respect to filing an appeal. Petitioner did not attach the October 14, 1992 letter to his Application.

By Order dated December 14, 1993, the Tulsa County District Court denied Petitioner's Application. The court noted that nothing supported Petitioner's statements that he attempted to contact his attorney by letter on October 14, 1992. In addition, an affidavit from Petitioner's attorney indicated that she had thoroughly searched her files for any letters from Petitioner. Petitioner's attorney located one letter, dated October 28, 1992, requesting assistance in filing an appeal. Petitioner's attorney responded to Petitioner's letter, informing Petitioner that the deadline for filing a motion to withdraw his plea had passed. The record contains copies of Petitioner's October 28, 1992 letter. The trial court concluded that "the petitioner was advised of his right to appeal and the record reflects that petitioner took no steps to attempt

or perfect a timely direct appeal. Nor has the petitioner offered any sufficient reason for the petitioner's failure to file a timely direct appeal of petitioner's conviction. . . . The Court finds that no appeal has been sought or perfected, nor has any sufficient reason been offered by the petitioner for Petitioner's failure to so do." Order of the Tulsa County District Court, dated December 14, 1993, at 3-4.

Petitioner filed a Petition in Error in the Oklahoma Court of Criminal Appeals.

The Oklahoma Court of Appeals upheld the decision of the Tulsa County District Court.

The record indicates that the only pertinent argument made by Appellant before the District Court was that his attorney did not respond to a letter he alleges he sent to his attorney on October 14, 1992, asking his attorney to file a motion to withdraw his guilty pleas. The District Court, however, specifically found that the only support for this argument consisted of Appellant's self-serving statements. Further, the attorney who represented Appellant at his guilty plea hearing executed a sworn affidavit to the effect that, after searching her files, the only letter she found from Appellant requesting an appeal was dated October 28, 1992; she responded by letter that it was too late to perfect an appeal since Appellant should have, if he desired to appeal, filed a motion to withdraw his guilty pleas within ten days from the date of his guilty pleas, as he had been informed by the judge. Based upon the record before this Court, we find no reason to disturb the findings of the District Court and conclude that Appellant was not denied an appeal through no fault of his own.

Order of the Oklahoma Court of Criminal Appeals, dated April 7, 1994.

The state court concluded that Petitioner made no attempt to contact his attorney within ten days after the entry of his plea of guilty. Federal habeas law presumes that State court factual findings are correct.

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1) (emphasis added). Therefore, Petitioner has the burden of presenting clear and convincing evidence to this Court to counter the State court factual finding. Petitioner does not meet this burden.

Petitioner presents no new arguments that were not addressed or heard by the state court. The only "new evidence" which Petitioner presents is a sworn affidavit, dated November 26, 1996, in which Petitioner states that he sent a note to the Tulsa County Public Defender's Office on October 14, 1992, inquiring about withdrawing his guilty plea. Petitioner further states that he was transferred on October 16, 1992 and therefore did not see his public defender prior to being transferred. Petitioner claims that he sent a second letter on October 28, 1992. This affidavit is merely a reiteration of Petitioner's argument in state court.

In addition, Petitioner attaches a copy of the letter he claims that he sent on October 14, 1992. The letter appears to be initially dated October 16, 1992, but a "4" is written over the "6," making the date of the letter October 14, 1992. The letter states, "I would like for you to come visit me here in the Tulsa County Jail about withdrawing my plea of guilty, which I entered this past Monday, October 12, 1992. I will discuss my reasons for withdrawing the plea when you come up here."

Petitioner presents nothing further to this Court to substantiate his assertion that he attempted to and/or did contact his attorney within the ten day time period after his guilty plea. Assuming that Petitioner's first letter was missing and only recently located, the letter and Petitioner's affidavit simply do not constitute clear and convincing evidence to rebut the presumption of correctness which this Court is required to give to State court factual findings. Furthermore, Petitioner's explanation for not providing the October 14, 1992 letter to the state court is that he "had misplaced [the letter] until a thorough search of his files were done by the inmate paralegal who prepared this response for the petitioner." Petitioner's Brief at 7. This letter has apparently been missing since at least 1993, and was located in 1996, in time for Petitioner to file his brief. The Court finds Petitioner's representation with respect to the letter somewhat incredulous. In addition, contrary to the representations made by Petitioner in his Brief, Petitioner's "second letter" does not inquire as to why Petitioner's attorney did not respond to Petitioner's "first letter." The undersigned Magistrate Judge concludes that Petitioner has not rebutted the factual findings of the State court. Consequently, the record does not indicate that Petitioner attempted to contact his attorney within ten days after the Petitioner pled guilty.

As noted above, pursuant to <u>Laycock</u>, Petitioner's attorney was not required to discuss with Petitioner his right to appeal unless Petitioner asked about his appellate rights or unless a claim of error was made on constitutional grounds that could result in setting aside the plea. Petitioner does not meet the "first prong" of <u>Laycock</u>. Giving

due deference to the factual findings of the state court, the Magistrate Judge concludes that Petitioner did not contact his attorney within the requisite ten days. The other possibility under <u>Laycock</u> is if a claim is made on a constitutional ground that could result in setting aside the plea. Petitioner makes no such claims, and a review of the record reveals no such claims.<sup>2</sup>/

Petitioner was informed, on the record, of his right to appeal by the Tulsa County District Court. Based on the record, the Magistrate Judge concludes that Petitioner's attorney did not have a duty to contact Petitioner within the ten days after the entry by Petitioner of a guilty plea to further discuss Petitioner's right of appeal. The Magistrate Judge therefore recommends that the District Court find that Petitioner was not deprived of effective assistance of counsel.

#### **RECOMMENDATION**

The Magistrate Judge recommends that the District Court find that Petitioner has not been deprived of his due process rights and has not been denied effective assistance of counsel. The Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

<sup>&</sup>lt;sup>2/</sup> In his Application for Post-Conviction Relief for an Appeal Out of Time, filed in the Tulsa County District Court, Petitioner alleged that the trial court violated Oklahoma law by accepting a guilty plea without an appropriate factual basis. Petitioner does not assert this argument in this Court. Regardless, this argument does not implicate a federal constitutional right. <u>See</u>, <u>e.g.</u>, <u>Sena v. Romero</u>, 617 F.2d 579 (10th Cir. 1980); <u>Freeman v. Page</u>, 443 F.2d 493 (10th Cir. 1971) *cert denied*, 404 U.S. 1001.

#### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 29 day of September 1997.

Sam A. Joyner

United States Magistrate Judge

#### CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the latter by the pay of the parties of the pay of the pay

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHENTERED ON DOCKET

JONNIE MYERS,	)	DATE $9-30-97$
Plaintiff,	{	
v.	) c	ase No. 96-CV-684-H
DEPARTMENT OF HUMAN SERVICES,	}	FILED
Defendant.	)	SEP 2 9 1997
	ORDER	Phil Lombardi, Cierk U.S. DISTRICT COURT

This matter comes before the Court on Defendant Department of Human Services's ("DHS") motion for summary judgment (Docket # 11). Plaintiff, a former social worker, alleged DHS discriminated against her based upon her sex and age by assigning her an excessive number of cases as compared to other social workers.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling

Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480

U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ.

P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." <u>Id.</u> at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250

("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

At a hearing on May 30, 1997, DHS introduced computer records that indicated Plaintiff was not assigned a disproportionately larger number of cases than other social workers. Plaintiff produced no evidence to controvert these records. The Court, however, expressed concern about the number of cases which DHS records showed were attributed to "vacant" positions.

Accordingly, the hearing was continued until September 12, 1997, to allow DHS to manually inspect the files at issue and determine in fact to whom those cases were assigned. According to evidence presented at the September 12 hearing, DHS's inspection indicated that Plaintiff was assigned only 41 of the 1,170 cases attributed to "vacant" positions.

The evidence produced by Defendant is uncontroverted. At the hearing, Plaintiff stated that she could produce only one piece of evidence to refute these uncontroverted facts, a document labeled Exhibit "I" to Plaintiff's response to Defendant's motion for summary judgment. Exhibit "I" is a computer printout that Plaintiff claimed demonstrates she had 100 more cases than the average case load of other social workers.

Plaintiff's Exhibit "I," however, does not present an uncontroverted fact which would preclude summary judgment. The document, which is not identified to time and context, provides no comparison whatsoever to caseloads of other social workers at that time and thus is not probative on the issue of proportionality. Absent any showing of disproportionality between Plaintiff and other social workers, Exhibit "I" does not controvert Defendant's statements of the relative caseloads during the time period at issue.

Since the facts in this case are uncontroverted that there was no misallocation of cases to Plaintiff as a result of discrimination or otherwise, there is no support for Plaintiff's claim.

Accordingly, Defendant's motion for summary judgment (Docket # 11) is hereby granted.

IT IS SO ORDERED.

This 297 day of September, 1997.

Sven Erik Holmes

United States District Judge

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHO

MA	LLED
•	SEP 29 1907
u.s. E	Lombardi, Clerk DISTRICT COURT
-C-0014-	H •

MICHAEL HEMMATI, Plaintiff, v. Case No. 96-STELLAR COMMUNICATIONS, INC., JURY TRIAL DEMANDED an Oklahoma corporation, ENTERED ON DOCKET

#### **JUDGMENT**

Defendant.

The Court having before it the Defendant's Offer of Judgment filed herein on April 7, 1997; (ii) the Plaintiff's Acceptance of Offer of Judgment (served on April 17, 1997) as part of the Plaintiff's Service of Notice of Acceptance of Offer of Judgment filed herein on April 17, 1997; and (iii) the Plaintiff's Application for Attorneys Fees, filed herein on May 9, 1997 and the parties' respective briefs thereon; the parties having agreed, by the Offer of Judgment and its acceptance to Defendants paying Plaintiff \$1,000 plus a reasonable attorneys' fee; the Court having decided, by its Order of September 3, 1997 (filed September 4, 1997) that a reasonable attorneys' fee for the Plaintiff in this case is \$12,041.25; and being fully advised, it is hereby

ORDERED AND ADJUDGED that the Plaintiff MICHAEL HEMMATI recover from the Defendant STELLAR COMMUNICATIONS, INC., the sum of \$13,041.25, with interest thereon at the rate provided by law, and such costs as are allowed on subsequent application.

DATED this 29 H day of September, 1997.

STATES DISTRICT JUDGE



### APPROVED AS TO FORM:

DOUGLAS L. INHOFE, OBA No. 4550 MARK A. WALLER, OBA No. 14831

INHOFE JORGENSON BALMAN & WALLER,

A Professional Corporation

907 Philtower Building

427 South Boston Avenue

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(918) 583-4300 (Telephone)

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Bv

Attorneys for Plainting MICHAEL HEMMATI

STEVEN A. BROUSSARD, OBA No. 12582

HALL, ESTILL, HARDWICK, GABLE GOLDEN & NELSON, P.C.

320 S. Boston Avenue

Suite 400

Tulsa, Oklahoma 74103-3708

By

Actorneys for Defendant

STELLAR COMMUNICATIONS, INC.

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

		ENTERED ON DOCKE
DENA HIRSHEY,	)	9-30-97
Plaintiff,	}	DATE
v.	) Case No	96-CV-964-H FILED
LINCOLN NATIONAL LIFE	<b>'</b>	LITE D
INSURANCE COMPANY,		SEP 2 9 1997 ${\mathbb V}$
Defendant.	ý	Phil Lombardi, Clerk U.S. DISTRICT COURT
	<b>JUDGMENT</b>	U.S. DISTRICT COURT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered by a jury in favor of Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant make payment to Plaintiff in the amount of \$25,000.

IT IS SO ORDERED.

This 22 day of September, 1997.

Sven Erik Holmes

United States District Judge

## UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

	ENTERED ON DOCKET
UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs,	DATE 19-30-97
Plaintiff,	FILED
<b>v.</b>	SEP 29 1997
LEONARD L. GLASS aka Leonard Lloyd Glass; ANGELIA R. GLASS aka Angelia Rae Glass; COUNTY TREASURER, Delaware County, Oklahoma; BOARD OF COUNTY COMMISSIONERS,	Phil Lombardi, Clerk U.S. DISTRICT COURT  )
Delaware County, Oklahoma; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission,	
Defendants.	CIVIL ACTION NO. 97-CV-221-H

### JUDGMENT OF FORECLOSURE

This matter comes on for consideration this <u>25</u> day of <u>Saranana</u>,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern

District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the

Defendants, County Treasurer, Delaware County, Oklahoma, and Board of County

Commissioners, Delaware County, Oklahoma, appear by Jennifer T. Earls, Assistant District

Attorney, Delaware County, Oklahoma; and the Defendants, Leonard L. Glass aka Leonard

Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Leonard L. Glass aka Leonard Lloyd Glass, was served with Summons and Complaint by a United States Deputy Marshal on June 6, 1997; that the Defendant, Angelia R. Glass aka Angelia Rae Glass, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on May 20, 1997;



that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Entry of Appearance on May 23, 1997.

It appears that the Defendant, County Treasurer, Delaware County, Oklahoma, filed its Answers on March 27, 1997 and May 28, 1997; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on May 23, 1997; and that the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 28, 1992, Leonard Lloyd Glass and Angelia Rae Glass filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-00258-W. This case was dismissed by Order filed on April 3, 1992; subsequently, the case was closed on May 8, 1992.

The Court further finds that on October 31, 1995, Leonard Lloyd Glass and Angelia Rae Glass filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-03413-W. The subject real property was made a part of the bankruptcy estate as shown on Schedule A of the bankruptcy case schedules. On August 21, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Delaware County, Oklahoma, within the Northern Judicial District of Oklahoma:

A tract of land lying in Lot Four (4), Section 19, Township 20 North, Range 24 East, Delaware County, State of Oklahoma, according to the U.S. recorded survey thereof, more particularly described as follows, to wit:

Commencing at NW corner of Lot 4, thence South 248.70 feet for a point of beginning, thence South 104.35 feet, thence East 208.71 feet, thence North 104.35 feet, thence West 208.71 feet to the point of beginning.

The Court further finds that on August 4, 1986, William D. Catron and Renee Kay Catron, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$19,800.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, William D. Catron and Renee Kay Catron executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated August 4, 1986, covering the above-described property, situated in the State of Oklahoma, Delaware County. This mortgage was recorded on August 20, 1986, in Book 508, Page 66, in the records of Delaware County, Oklahoma.

The Court further finds that on May 31, 1995, William D. Catron and Renee Kay Catron, husband and wife, conveyed all their interest in the above-described property to Leonard L. Glass and Angelia R. Glass, husband and wife. This Warranty Deed was recorded on June 1, 1995, in Book 871, Page 221, in the records of Delaware County, Oklahoma.

The Court further finds that the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, are indebted to the Plaintiff in the principal sum of \$12,543.19, plus administrative charges in the amount of \$525.00, plus penalty charges in the amount of \$229.00, plus accrued interest in the amount of \$3,702.38 as of March 11, 1997, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendant, County Treasurer, Delaware County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1996 personal property taxes in the amount of \$24.04, plus penalties and interest beginning January 1, 1997. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Delaware County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel.

Oklahoma Tax Commission, has a lien on the property which is the subject matter of this

action by virtue of Tax Warrant No. ITI9501449500 dated August 22, 1995, and in the amount of \$1,959.49 together with interest and penalty according to law. Said lien is inferior to the interest of the Plaintiff, United States of America.

Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, in the principal sum of \$12,543.19, plus administrative charges in the amount of \$525.00, plus penalty charges in the amount of \$229.00, plus accrued interest in the amount of \$3,702.38 as of March 11, 1997, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Delaware County, Oklahoma, have and recover judgment in the amount of \$24.04, plus penalties and interest beginning January 1, 1997, for 1996 personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Board of County Commissioners, Delaware County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$1,959.49 together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9501449500 dated August 22, 1995.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Leonard L. Glass aka Leonard Lloyd Glass and Angelia R. Glass aka Angelia Rae Glass, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

### First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

#### Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

#### Third:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission;

#### Fourth:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Delaware County, Oklahoma, for unpaid personal property taxes.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS United States Attorney

PETER BERNHARDT, OBA #741

Assistant United States Attorney 333 West 4th Street, Suite 3460 Tulsa, Oklahoma 74103 (918) 581-7463

JENNIFER T. EARLS, OBA #016391

Assistant District Attorney

P.O. Box 528

Jay, Oklahoma 74346

(918) 253-4217

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Delaware County, Oklahoma

Judgment of Foreclosure Case No. 97-CV-221-H (Glass) KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission



Judgment of Foreclosure Case No. 97-CV-221-H (Glass)

PBress

GO)

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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SEP	2	9	1997
Ha.			/Z.

WILLIAM R. McCONAHA,	Phil Lombardi, Clerk U.S. DISTRICT COUR
Plaintiff,	) Side DISTRICT COUR
vs.	) Case No. 96CV-932BU
AMERICAN AIRLINES, INC., a Delaware corporation,	) )
-orporation,	
Defendant.	SEP 2 9 1997

## JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff William R. McConaha and Defendant American Airlines, Inc., by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

David C. Phillips, III, OBA #13551 D.C. Phillips & Associates, P.C. 115 West Third Street, Suite 525 Tulsa, Oklahoma 74170 (918) 584-5062

Attorney for Plaintiff WILLIAM R. McCONAHA

David R. Cordell, OBA #11272
John A. Bugg, OBA #13665
CONNER & WINTERS,
A Professional Corporation
2400 First Place Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Defendant, AMERICAN AIRLINES, INC.

DATE 4-29-97

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIMITED GAMING OF AMERICA,

Plaintiff,

LIGHT

vs.

No. 96-C-1019-

92, 20 1337

DORAN, WALTERS, ROST, SELTER & WOLFE,

Defendant.

Phil Lombardi, Clerk U.S. DISTRICT COURT

### ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 29 day of September, 1997.

TERRY C. KERN, Chief

UNITED STATES DISTRICT JUDGE

	STATES DISTRICT COURT	FILED
FOR THE NORTHE	ERN DISTRICT OF OKLAHOMA	SEP 26 1997/
BOBBY D. SIMMONS,	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	)	
vs.	) Case No. 96-CV-608-C	
LARRY FIELDS, Director O.D.O.C., et al.,	) )	
Defendants.	)	D ON DOCKET SEP 2 9 1367
	ORDER	· · · · · · · · · · · · · · · · · · ·

BEFORE the Court are the following motions: the motion of Southern Corrections Systems, Inc. and Shirley Braden to dismiss under Rule 12(b)(5) and 12(b)(6) (doc. #5); the motion to dismiss, or for summary judgment, of Defendant Fields (doc. #12); and the motion to dismiss, or for summary judgment, of Defendant Howard (doc. #16). Plaintiff, appearing pro se and in forma pauperis, has responded to each of the motions. A court-ordered Martinez report has been filed. For the reasons stated herein, the Court concludes Plaintiff's civil rights complaint fails to state a claim upon which relief can be granted, and, therefore, should be dismissed.

## Background

Plaintiff was received by the Oklahoma Department of Corrections on December 20, 1995, after being convicted of knowingly concealing stolen property after former conviction of a felony and being sentenced to three (3) years imprisonment. He was transferred to the

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Tulsa Community Corrections Center (TCCC) and on February 9, 1996, housed at the Avalon Halfway House (Avalon). While incarcerated at Avalon, Plaintiff secured a job and began working for a construction company. During the months of February, March and April of 1996, Plaintiff sent several letters to various prison officials regarding numerous issues. These issues are set out in the following table:

Date	Complaint	Response
2/26/96 letter to Mr. Fields	(1) "Received bologna sandwiches 5 days a week while I go to work" (2) No place to sit outside while visiting (3) Won't allow food items in locker (4) Wants lateral transfer to 12x12 Halfway House	3/7/96 - Letter from Kathy Waters, Deputy Director, advising to "follow the standard grievance process. If you are not satisfied with the facility head's response, you may then appeal to the director."
		2/29/96 - James Williams, Avalon staff personnel, "approx. 1703 on Feb. 29, 1996, I/M Simmons began to enter dining hall told him to stop because his name was on the late dinner list. I/M Simmons proceded [sic] to enter dining hall without obeying told Simmons that he could not eat until 1800. Simmons continued to disobey a direct order and would not leave Cathcart told dining staff not to give him food so he then left the dining hall."  Recommendation: Drop one level and 20 hours special duty.  Agreed by Panel & Administrator.

Date	Complaint	Response
3/3/96 Grievance Report Form	(1) No breakfast or sack lunch made; "had to go hungry" to work	3/14/96 - Letter from Bill McCollum, Acting Regional Director  1. Policy at Avalon is that should an inmate have a return from work time past the dinner meal service time, they must sign up for a late tray. The tray will be waiting for them upon their return from work.  2. Avalon's records reflect that on 2/29/96, Simmons returned at 1625 hours and was permitted to eat in dining hall contrary to what is stated in letter.  3. Grievance forms have been provided, and Simmons was directed to "attempt to resolve" the grievance "prior to filing a grievance."  4. Avalon is in compliance with the DOC contract standards, is monitored by DOC, and "is attempt[ing] to abide by established policy."
3/6/96 Avalon Request To Staff Form	(1) Ofc. Sellers took blue Dallas Cowboy hat	3/7/96 - Michael Brown, Avalon staff personnel, "that hat has been listed as contraband"
3/11/96 Avalon Request To Staff Form	(1) Wants to go to church (2) Wants to go to mandatory programs	3/12/96 - Michael Brown, Avalon staff personnel, "you are restricted to center 'work only"  3/29/96 - Letter from Bill McCollum, Acting Regional Director, NE Region.  1. Supt. Hudley advises Simmons confined in holding cell at TCCC under investigation for failure to properly budget paycheck and for failure to abide by program rules.  2. Advised to use grievance procedure and first step would be to write Supt. Hudley.
3/12/96 Offender Grievance Form	(1) Theft of property (2) violation of DOC policies (3) Wants to go to church and manda- tory programs	3/22/96 - Letter from Kathy Waters, Deputy Director. Follow standard grievance process. If not satisfied, you may then appeal to director.

Date	Complaint	Response
3/16/96 letter to Mr. Fields	(1) Tried resolving problems informally but Avalon refuses to follow law and DOC policies	
3/21/96 letter to Mr. Fields	(1) Response to waiting until 1830 hours to eat (2) Punished twice for not being able to eat: once when did not eat; second because received drop in one level and 20 hours special duty (3) Wants lateral transfer to 12x12 Halfway House	3/26/96 - Letter from Kathy Waters, Deputy Director - advising grievance procedure has not been used; discipline for abuse of grievance procedure will result in grievance restriction if Simmons continues to "send letters without going through the proper procedure"
3/22/96 Avalon Request To Staff Form	(1) Wants to pick up property	3/25/96 - Officer Dunkle, TCCC staff, "your property is an issue to be resolved between yourself and Avalon. Your designated person can pick it up or you can make arrangements to have it mailed."  4/5/96 - Memorandum from Rick Hudley, Supt. TCCC "situation was relayed back to staff of Avalon and enclosed letter (4/3/96) from Director Shirley Braden addresses your specific concerns" "follow her instructions concerning disposition of your personal property"
3/22/96 Avalon Offender Grievance Form	(1) Wants lateral transfer to 12x12 Halfway House or allowed to do work from TCCC	

Date	Complaint	Response
3/29/96 NEOCC Offender Grievance Report Form	(1) Placed in RHU for program failure (2) Property left at Avalon, unsecured (3) Sent request and was told "it was my problem"	
4/1/96 NEOCC Request to Staff Form	(1) Wants property and mail forwarded to NEOCC from Avalon	4/1/96 staff officer "spoke with Sgt. Lewis at Avalon and he advised he would mail it by but it would take 5 to 30 days"
4/1/96 NEOCC Offender Grievance Report Form	(1) Wants to keep food in locker	
4/1/96 letter to Mr. Fields	(1) arbitrarily assigned extra duty (2) moved to higher security for no just cause	

Date	Complaint	Response
		4/3/96 - Letter from Shirley Braden,
		Administrator of Avalon Correctional Center,
		to Superintendent Rick Hudley at TCCC
		1. Avalon does utilize Incident Report Form.
		Each Incident Report Form filed on an inmate does before review panel.
		Then Administrator reviews Incident Form.
		Typical recommendations would have inmate
		counseled by staff, require inmate to perform
		specific number of hours of special duty, loss
		of privileges for a specific time frame,
		restriction of movement, drop of classification
		level, restitution when program support fees
		are not paid.
		Avalon does not impose sanctions in violation
		of DOC standards.
		2. Inmate Simmons had an incident report
		filed on him on 2/29/96 for which it was
		recommended that he be dropped on level and
		perform 20 hours special duty.
		3. Inmate Simmons had an incident report
		filed on him for failure to turn in his pay
		check he received on 3/11/96. For this report,
		he was to pay restitution, which he agreed to on 3/20/96.
		4. Avalon does not tell one inmate to borrow
		anything from another inmate.
		5. Inmate Simmons did not provide any
		instance where he was told to do this, and this
		cannot be investigated any further.
		6. An indigent inmate must submit a request
		to receive free postage.
		7. Inmate Simmons never submitted a request
		for free postage.
		8. Avalon utilizes sign-up sheet for sack
		lunches - one day in advance. If the

Date	Complaint	Response
		inmate does not sign up - no sack lunch. All inmates are informed of this procedure during orientation and it is listed in the house rules.  9. Avalon will take formal or informal action anytime it is discovered an inmate is off itinerary. No incident report or misconduct report was ever "filled on" Inmate Simmons for being off his itinerary.  10. Avalon has Client Property Policy, which is coordinated with DOC policy. All property confiscated from any inmate will be disposed of in accordance with this policy.  RECOMMENDED: Inmate Simmons be "program failed" due to his continuous display of a negative attitude, he challenged authority whenever possible, and his refusal to work the program in any manner by attending any required meetings.  AFFIRMED BY DIRECTOR.
4/4/96 NEOCC Request to Staff	(1) Wants "program failure" evaluation dismissed (2) Moved back to "proper security level"	4/9/96, Avalon staff personnel, "property policy - is going to check on this"  4/15/96 - Letter from Kathy Waters, Deputy Director - "try to resolve through standard grievance process"

Date	Complaint	Response
4/8/96 Letter to Mr. Fields	Response to letter from Supt. Hudley (Memo 4/5/96) (1) Special duty contrary to Avalon policy (2) Cashed check to buy food or "starve" (3) Yes, you can borrow money (4) No free mail at Avalon (5) If you "forget to sign up" for sack lunch, Avalon "send you to work without" lunch (6) Avalon makes you fill out itinerary to go on job search contacts "knowing good & well you can only make one of them because of bus schedule" "you have to put down two" (7) Stolen hat - it was someone's and he had to pay him for it; the other property of his wants to send home (8) Program failure - did attend meetings except when restricted	

Date	Complaint	Response
4/9/96 Letter to Mr. Fields	Re: Letter (4/8/96) sent to Fields in response to Memo from Supt. Hudley (4/5/96) (1) Did not want copy sent to NEOCC warden, Middleton (2) Only trying to "put a bad jacket on me to cause problems here" (3) Wants to move to Enid CTC	4/23/96 - Letter from Kathy Waters, Deputy Director - Advised placed on grievance restriction beginning April 23, 1996 through April 22, 1997 for failure to follow grievance policy and for abusing grievance process
4/12/96 NEOCC Request to Staff Member	(1) Wants TCCC to pickup his property at Avalon and bring or mail it to TCCC	6/14/96 - NEOCC staff officer Henson, "you need to send request of staff to Avalon or TCC about this. I don't have anything to do with it or have your counselors called them."
4/29/96 NEOCC Request to Staff	(1) Wants property from Avalon	5/28/96, NEOCC, Warden J. Middleton "Avalon House has informed our staff that the property was disposed of in accordance with their procedures. Apparently, the time had elapsed for pickup of property."

Plaintiff filed his original Complaint on July 3, 1996, seeking monetary and injunctive relief. On September 3, 1996, Plaintiff attempted to file an Amended Complaint, but failed to sign it. The Court directed Plaintiff to submit a Second Amended Complaint, ensuring that it contained his signature. Plaintiff's Second Amended Complaint was then filed on October 17, 1996, adding Shirley Braden as Administrator of Avalon Correctional Center as a defendant. In this Second Amended Complaint, Plaintiff again requested monetary and injunctive relief.

Defendants have filed motions to dismiss, stating Plaintiff has failed to state a claim upon which relief can be granted and therefore his claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court agrees. Plaintiff's claims that he received bologna sandwiches 5 days a week, that he failed to receive a sack lunch or breakfast (after failing to follow prison regulations), and that defendants disposed of his personal property (after Plaintiff failed to follow prison policy) do not amount to constitutional violations. After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's complaint fails to state a claim upon which relief can be granted. Furthermore, it is patently obvious that the Plaintiff cannot prevail on the facts alleged, and allowing an opportunity to amend would be futile. Hall v. Bellmon, 935 F.2d 1106, 1109-10 (10th Cir. 1991).

Additionally, this § 1983 complaint was filed after the April 26, 1996, enactment of The Prison Litigation Reform Act (PLRA). Those PLRA provisions having no impermissible retroactive effect, including the amendments to 28 U.S.C. § 1915, apply to this case. Because Plaintiff was allowed to proceed *in forma pauperis*, the Court finds that this dismissal for failure to state a claim should count as a "strike" as mandated by 28 U.S.C. § 1915(g). Therefore, the Clerk of the Court should flag this as a dismissal pursuant to 28 U.S.C. § 1915(g).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motions to dismiss (#5, #12, #16) are granted, and Plaintiffs' complaint is dismissed with prejudice. The Clerk of the Court is directed to flag this as a dismissal pursuant to 28 U.S.C. § 1915(g).

SO ORDERED this <u>25</u> day of <u>Sept</u>, 1997.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

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# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY W. DIXON, and MERCEDES R. LACKEY, individually and as husband and wife,  Plaintiffs,	DATE SEP 2 6 1997
vs.  STATE FARM FIRE AND CASUALTY	) Case No. 97-CV-224-B ) [Consolidated with 97-CV-226-B]
COMPANY, a foreign insurance corporation,  Defendant.	) ) )
and	
LARRY W. DIXON, and MERCEDES R. LACKEY, individually and as husband and wife,	FILED  SEP 2 4 1997
Plaintiffs, vs.	) Phil Lombardi, Clerk ) U.S. DISTRICT COURT
STATE FARM GENERAL INSURANCE Company, a foreign insurance corporation,	) ) )
Defendant	,

### JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, plaintiff Mercedes Lackey, plaintiff Larry Dixon, defendant State Farm Fire and Casualty Company and defendant State Farm General Insurance Company, and pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, hereby stipulate to dismiss the



above-entitled consolidated actions, and any and all causes of action arising therefrom, with prejudice to refiling, and with each party to bear their own costs and attorney fees.

WILLIAMS & BOLT, P.A.

ROGER R. WILLIAMS, OBA #9681

DONALD B. BOLT, III., OBA #15729

1605 South Denver

Tulsa, Oklahoma 74119-4249

(918) 583-1124

Attorneys for Plaintiffs, Mercedes Lackey and Larry Dixon.

STAUFFER, RAINEY, GUDGEL & HATHCOAT, P.C.

BY:

NEAL E. STAUFFER, OBA #13168

KENT B. RAINEY, OBA #14619

1100 Petroleum Club Building

601 S. Boulder

Tulsa, OK 74119

(918) 592-7070

Attorneys for Defendants, State Farm Fire and Casualty Company and State Farm General Insurance Company.

### **CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 24 day of September 1997, a true and correct copy of the above and foregoing instrument was mailed with postage prepaid thereon, to the following:

Roger R. Williams, Esq, Donald B. Bolt, Iii., Esq. WILLIAMS & BOLT, P.A. 1605 South Denver Tulsa, Oklahoma 74119-4249 (918) 583-1124

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# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

## FILED

SEP 25 1997

LARRY W. DIXON, and MERCEDES R. LACKEY, individually and as husband and wife,	) )	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiffs,	) )	
vs.	)	Case No. 97-CV-224-B
STATE FARM FIRE AND CASUALTY COMPANY, a foreign insurance corporation,	) ) )	[Consolidated with 97-CV-226-B]
Defendant.	)	
and		
LARRY W. DIXON, and MERCEDES R. LACKEY, individually and as husband and wife,	)	
Plaintiffs,	) ) )	ENTERED CO.
vs.	)	DATE SEP ON DOCKET
STATE FARM GENERAL INSURANCE Company, a foreign insurance	)	DATE SEP & JAMI
corporation,	)	
Defendant.	)	

## ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the parties' Joint Stipulation of Dismissal with Prejudice. Upon due consideration, it is hereby

ORDERED, ADJUDGED, AND DECREED that the above entitled consolidated actions are hereby dismissed with prejudice to refiling.



Dated this \_\_25 day of September, 1997.

Thomas R. Brett

SENIOR UNITED STATES DISTRICT JUDGE

gw/

NORTHERN DISTRICT OF OKLAHOMA ENTERED C			
ROBERT WIRTZ,	DATE <u>SEP 2 6 1997</u>		
Plaintiff,	) )		
vs.	Case No. 96-CV-969-E FILED		
STANLEY GLANZ, et. al.,	) Judge James Ellison ) SEP 2 5 1997		
Defendants.	) Phil Lombardi, Clerk U.S. DISTRICT COURT		

### STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Robert Wirtz, Stanley Glanz, Sheriff of Tulsa County, Fred Morgan, Lorraine Mathis, Jane Doe and Judge Ned Turnbull, hereby stipulate that the action against all defenants may be dismissed with prejudice.

DICK A. BLAKELEY

Assistant District Attorney
Attorney for Stanley Glanz
Fred Morgan, Lorraine Mathis,

Jane Doe and Judge Ned Turnbull

ROBERT-WIRTZ

Pro Se

CLI

FILED

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 2 1997 Phil Lombard, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF CHANGE

RICKY LEE HENDRICKS

Petitioner.

vs.

Case No. 97-CV-21-C (M)

RON WARD and ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Respondents.

ENTERED ON DOCKET

DATE SEP 2 6 1297

### REPORT AND RECOMMENDATION

The Respondents' MOTION TO DISMISS PETITION FOR HABEAS CORPUS FOR FAILURE TO EXHAUST STATE REMEDIES [Dkt. 11] is before the undersigned United States Magistrate Judge for report and recommendation.

Petitioner, Ricky Lee Hendricks, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging: (1) he was denied due process in conjunction with his removal from the Oklahoma Preparole Conditional Supervision ("PPCS") program following a misconduct offense; (2) he was subjected to double jeopardy in violation of the Fifth Amendment when he was sentenced to 5 years in prison, lost prison good time credits, and lost his drivers license for three years as a result of a single DUI charge. Respondents seek dismissal of this petition for Petitioner's failure to exhaust all available state remedies as required by 28 U.S.C. § 2254(b).

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED.



### **BACKGROUND**

Petitioner was serving time in the custody of the Oklahoma Department of Corrections on a Wagoner County Conviction. On December 6, 1994, he was released from prison confinement into a program known as Preparole Conditional Supervision ("PPCS"). In PPCS convicts are allowed to live and work in society under the supervision of a state probation and parole officer. On December 29, 1994, Petitioner was arrested in Rogers County for driving under the influence of intoxicating liquor ("DUI"), 74 Okla. Stat. § 11-902.

Petitioner was presented with an offense report which informed him that his arrest for DUI was a violation of PPCS program rules. He was informed that he was entitled to receive a disciplinary hearing on the charge, but waived that right. His signature on the waiver portion of the offense report form indicated that he waived hearing, "of my own free choice with full knowledge that this shall be considered as a plea of guilty and that allowable sanctions be imposed with no right for appeal." [ED-Dkt. 4, Ex. C]. On December 30, 1994, loss of 244 earned credits was imposed as punishment for the offense. [ED-Dkt. 4, Ex. D].

On February 1, 1995, Petitioner plead guilty to the criminal DUI charge in Rogers County Case Number CR-94-352. His sentence, enhanced as a result of prior

<sup>&</sup>lt;sup>1</sup> This case was transferred from the Eastern District of Oklahoma. There were 8 documents docketed in the Eastern District before the transfer. Those documents are maintained in the Court file by their Eastern District docket numbers and are so designated herein by the prefix "ED" preceding the docket number.

convictions, was 5 years imprisonment under the control of the Oklahoma Department of Corrections, "to run concurrently with Wagoner County Case with credit for time served[.]" [ED-Dkt. 4, Ex. D].

### DISCUSSION

The petition names the Attorney General of the State of Oklahoma as a respondent. Rule 2(a), Rules Governing Section 2254 Cases, provides that "the state officer having custody of the applicant shall be named as respondent." The Attorney General is not the state officer having custody of Petitioner and should therefore be DISMISSED as a respondent.

Petitioner presents what should be two separate habeas corpus petitions in a single petition. Whether Petitioner's right to due process was violated by the Department of Corrections in the process of his removal from PPCS is an entirely separate question from whether the sentence imposed in Rogers County was violative of the constitutional prohibition against double jeopardy. Oklahoma provides different remedial procedures to address each of these two distinct matters. Therefore the exhaustion of remedies question is analyzed separately for each of these matters.

A state prisoner bringing a federal habeas corpus action bears the burden of showing he has exhausted all available state remedies. *Miranda v. Cooper*, 967 F.2d 392 (10th Cir. 1992), *cert. denied*, 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). According to 28 U.S.C. § 2254:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; [emphasis supplied].

A writ of mandamus is the appropriate remedy against prison officials when prisoner's minimum due process rights have been violated and is the appropriate state remedy to address the loss of earned credits and removal from PPCS. *Johnson v. Department of Corrections*, 916 P.2d 264 (Okla.Crim.App. 1996). Petitioner has not demonstrated that he has sought a writ of mandamus to remedy the alleged due process violation. Pursuant to 28 U.S.C. § 2254(b)(1)(A), habeas corpus relief cannot be granted in this Court for the alleged denial of due process because Petitioner has not exhausted an available state remedy. It is therefore appropriate to DISMISS WITHOUT PREJUDICE that portion of his habeas corpus petition seeking relief for alleged due process violations connected with his loss of earned credits and removal from PPCS.

A challenge to a criminal conviction or sentence is brought pursuant to procedures outlined in the Post-Conviction Procedure Act, 22 Okla. Stat § 1080, et. seq. Petitioner has exhausted his state remedies with respect to his DUI sentence, however, relief is procedurally barred. Petitioner sought a writ of habeas corpus in the Rogers County District Court. The writ was denied by order dated April 3, 1996. [ED-Dkt. 4, Ex. A]. Petitioner then sought habeas corpus relief in the Court of Criminal Appeals, claiming he was entitled to immediate release from imprisonment on Rogers County Case Number CF-94-352 because he was punished twice for the same offense. On May 15, 1996, the Oklahoma Court of Criminal Appeals dismissed

Petitioner's petition, "because Petitioner did not provide the Court with any evidence that he sought and had been denied relief in the District Court as required by the Court Rules." [ED-Dkt. 4, Ex. 5]. Petitioner sought rehearing; the Court of Criminal Appeals issued an order denying rehearing, citing Rule 10.6(D) Rules of the Court of Criminal Appeals, which states that a petition for rehearing is not allowed.

If a state prisoner fails to meet a state procedural requirement, and the last state court to address the matter refuses to address the merits of the claims because of the procedural default, the claims are procedurally barred in federal habeas proceedings. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554 (1991). "In these cases, the state judgment rests on independent and adequate state procedural grounds." Id. at 730. "On habeas review, we do not address issues that have defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice or a fundamental miscarriage of justice is shown." Steele v. Young, 11 F.3d 1518, 1521 (10th Cir. 1993). Petitioner has shown neither cause for his state default nor a fundamental miscarriage of justice. "Cause" must be "something external to the petitioner, something that cannot fairly be attributed to him .... " Coleman, 501 U.S. at 753, 111 S.Ct. at 2566. Petitioner has offered nothing to suggest that external factors prevented him from complying with the Rules of the Court of Criminal Appeals. The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable

showing of factual innocence. *Steele*, 11 F.3d at 1522 (quoting *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862 (1993)). Petitioner has not made any showing or claim that he is factually innocent. Therefore, the double jeopardy issue is procedurally barred from federal habeas review and should be DISMISSED WITH PREJUDICE.

Although this petition contains both exhausted and unexhausted claims, the Court does not view it as a mixed petition which should be dismissed in its entirety without prejudice to allow for exhaustion of state remedies. *See, Rose v. Lundy*, 455 U.S. 509, 510 (1982). Instead, the Court views this case as actually containing two independent habeas matters which, according to Rule 2(d), Rules Governing Section 2254 Cases, should have been brought by separate petitions:

A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

Although the Oklahoma Department of corrections is not a court, and the removal from PPCS and loss of good time credits is not a judgment, that claim attacks the conditions of Petitioners restraint under his sentence for his Wagoner County conviction. The double jeopardy claim attacks the sentence for a Rogers County conviction. In the interest of judicial economy, the Court has not required Petitioner to file separate petitions, but has recommended that the claims be disposed of in the manner set forth herein.

### CONCLUSION

Based on the foregoing, the undersigned United States Magistrate Judge makes the following recommendation for the disposition of this habeas corpus petition:

- (1) The Attorney General should be DISMISSED as a respondent;
- (2) Petitioner's claims asserting due process violations in conjunction with his removal from PPCS should be DISMISSED WITHOUT PREJUDICE for failure to exhaust available state remedies;
- (3) Petitioner's claims asserting that he was subjected to double jeopardy should be DISMISSED WITH PREJUDICE as procedurally barred;
- (4) This disposition renders Petitioner's requests for entry of default against the respondent MOOT. [Dkt. 6, 10, 13].

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 24 day of September, 1997.

STATES MAGISTRATE

he undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

7

	LIPED
S.J.B., INC., a Tennessee corporation,	SEP 2 6 1997
Plaintiff,	) Phil Lombardi, Clerk U.S. DISTRICT COURT
vs.	) Case No. 96-CV-1160-H
NEWELL COACH CORPORATION, an Oklahoma Corporation,	ENTERED ON DOCKET
Defendant.	DATE <u>921, 97</u>

### STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the parties to the above-styled litigation by and through their counsel of record and hereby stipulate and agree that the above-styled matter should be dismissed with prejudice, with the Court retaining jurisdiction over the parties to resolve any dispute which may arise relating to the Settlement Agreement entered into between the parties in settlement of this matter.

Steven M. Harris, OBA #3913

Michael D. Davis, OBA #11282

DOYLE & HARRIS

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Attorneys for Plaintiff S.J.B., Inc.

RANDOLPH L JONES JR, OBA #16783

RICHARD R. LOVE III CONNER & WINTERS 2400 FIRST PLACE TOWER 15 EAST 5TH ST

TULSA OK 74103-4391

(918) 586-8955

FAX: (918) 586-8547 Attorneys for Defendant Newell Coach Corporation

852-2.035:nw

DATE 9-26-97

AV ····

	TATES DISTRICT COURT
FOR THE NORTHERN	DISTRICT OF OKLAHOMA
Lawson Petroleum Company, an Oklahoma Corporation,	$\begin{cases} F & I & E & D \end{cases}$
Plaintiff,	SEP 2 6 1997 ).  U.S. DISTRICT COURT
v.	Case No. 96-C-846-K
Exxon Corporation,	
Defendant.	) )

IN THE UNITED STATES DISTRICT COURT

### JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Lawson Petroleum Company, and the Defendant, Exxon Corporation, by and through their undersigned counsel of record, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure stipulate to a dismissal with prejudice of all claims in the above captioned action. Each party shall bear their own costs, attorney fees, and expenses.

Dated this 25th day of September 1997.

LAWSON PETROLEUM COMPANY

John M. Imel, OBA #4542 R. Scott Savage, OBA #7926

John W. Cannon, OBA #15738

James E. Maupin, OBA #14966

MOYERS, MARTIN, SANTEE,

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Telephone (918) 582-5281

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ATTORNEYS FOR PLAINTIFF, LAWSON PETROLEUM COMPANY

50

#### **EXXON CORPORATION**

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ATTORNEYS FOR DEFENDANT EXXON CORPORATION

c:\...\Lawson\JtDismissal

IN THE UNITED STATES DISTRICT COURT FOR THE

## FILED

NORTHERN DISTRICT OF OKLAHOMA

WILLIAM R. WENDT,	SEP 2
Plaintiff,	Phil Lomb U.S. DISTR
vs.	) Case No. 96-CV-600-BU
JOHN J. CALLAHAN, 1	)
Defendant.	ENTERED ON DOCKET  SEP 2 6 1997

#### **JUDGMENT**

Pursuant to the Order entered this same date, judgment is hereby entered in favor of Defendant, John J. Callahan, Acting Commissioner, Social Security Administration and against Plaintiff, William R. Wendt.

Entered this 25 day of September, 1997.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

 $<sup>^1</sup>$ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d) (1) John J. Callahan is substituted as the defendant in this suit.



FILED

SEP	2	5	1997
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WILLIAM R. WENDT,	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	O.S. DISTRICT COURT
vs.	) Case No. 96-CV-600-BU
JOHN J. CALLAHAN, 1	) }
Defendant.	SEP 2 6 1997

ORDER

On August 31, 1997, Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that the decision of the Commissioner denying disability benefits be affirmed. In the Report and Recommendation, Magistrate Judge McCarthy advised that any objections to the Report and Recommendation must be filed within ten (10) days of service of the Report and Recommendation. Upon review of the record, it appears that no objections to the Report and Recommendation have been

With no objections, the Court finds that the Report and Recommendations should be affirmed.

Accordingly, the Report and Recommendation of Magistrate Judge Frank H. McCarthy (Docket Entry #9) is AFFIRMED. The decision of the Commissioner denying social security disability benefits is also AFFIRMED.

<sup>&</sup>lt;sup>1</sup>President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.



filed.

Entered this 25 day of September, 1997.

ICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

F I L E D

SET S BY

Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF COURTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Civil Action No. 97-CV-366-E(J)

v.

BENEFUND, INC., and VERNON R. TWYMAN, JR.,

Defendants.

SEP 2 6 1997

## ORDER OF PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF BY DEFAULT AS TO DEFENDANT BENEFUND, INC.

This matter came before this Court on the motion of Plaintiff, Securities and Exchange Commission ("Commission"), seeking issuance of an order providing it with the relief requested in its Complaint against Defendant Benefund, Inc. ("Benefund") by reason of its failure to answer the Commission's Complaint, or otherwise appear in or defend this civil action.

This Court having considered the pleadings on file herein, makes the following findings of fact and conclusions of law:

- The Commission filed its Complaint commencing this action
   April 18, 1997.
- 2. Defendant Benefund was served with the Summons and Complaint on June 9, 1997, pursuant to Rule 4 of the Federal Rules of Civil Procedure, and the Return of Service was filed with the Court on June 16, 1997
- 3. No answer or other pleading or motion responsive to the complaint has been filed by Benefund or served upon the attorneys



for the Commission. No extensions of time to answer have been granted to Benefund, and the time for filing an answer has expired.

- 4. The Court has personal jurisdiction over Benefund, and subject matter jurisdiction over this action. Venue is proper in this District.
- 5. The Commission is entitled to entry of an order that permanently restrains and enjoins Benefund from engaging in transactions, acts, practices and courses of business which constitute and would constitute violations, or would cause violations, of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"), as amended [15 U.S.C. §§§ 77e(a), 77e(c) and 77q(a)], and from engaging in violations of Sections 10(b), 13(a) and 13(b) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, [15 U.S.C. § 78j(b), 78m(a), 78m(b)] and Rule 10b-5, 12b-20, 13a-1, 13a-11, 13a-13 and 13b2-1 thereunder [17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13 and 240.13;b2-1].
- 6. The Commission is entitled to entry of an order that directs Benefund to pay disgorgement, with prejudgment interest at the legal rate, and civil penalties. The Commission has requested, however, that the amount of such monetary relief be fixed through a subsequent application to the Court.

On the basis of the foregoing findings of fact and conclusions of law, it is therefore ORDERED:

Benefund, its agents, servants, employees, attorneys, and all persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise, are hereby restrained and enjoined, from violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], by, directly or indirectly, making use of any means or instrumentality of interstate commerce or of the mails, in connection with the purchase or sale of securities:

- (a) to employ any device, scheme or artifice to defraud;
- (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

II.

Benefund, its agents, servants, employees, attorneys, and all persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise, are hereby restrained and enjoined from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] by, directly or indirectly, making use of any means or instruments of

transportation or communication in interstate commerce, or of the mails, in the offer or sale of securities:

- (a) to employ any device, scheme or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) to engage in any transactions, practices or courses of business which operate or would operate as a fraud or deceit upon any person.

#### III.

Benefund and its agents, servants, employees, attorneys-in-fact, and all persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from violating Section 5(a) and (c) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77e(a) and (c), by, directly or indirectly, making use of any means or instruments of transportation or communication in interstate commerce, or of the mails:

a. to sell securities, in the form of common stock or any other security, through the use or medium of an offering document or otherwise, unless and until a registration statement is in effect with the Commission as to such securities;

- b. to carry securities, in the form of common stock or any other security, or cause them to be carried, through the mails and in interstate commerce, by any means or instruments of transportation, for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission as to such securities; or
- c. to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to offer to sell, or to offer to buy, through the use or medium of an offering document or otherwise, securities in the form of common stock or any other security, unless a registration statement has been filed with the Commission as to such securities, or while a registration statement filed with the Commission as to such securities is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding of examination under Section 8 of the Securities Act [15 U.S.C. § 77h];

provided, however, that nothing in this Part III. hereof shall apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act [15 U.S.C. § 77e].

IV.

Benefund and its agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with it who

receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §\$240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13] by filing, or causing to be filed, with the Commission any annual, quarterly or other periodic report required to be filed with the Commission, on behalf of any issuer, which: contains any untrue statement of material fact; omits to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or omits to disclose any information required to be disclosed.

٧.

Benefund and its agents, servants, employees, attorneys-infact and all persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, are permanently enjoined from violating Section 13(b) of the Exchange Act [15 U.S.C. § 78m(b)], and Rule 13b2-1 thereunder [17 C.F.R. 240.13b2-1], by failing, or causing the failure, to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §781], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §780(d)].

Following entry of this Order, the Commission shall make application to this Court, supported by affidavit or declaration, for an order setting the disgorgement amount, together with prejudgment interest at the legal rate, and of a civil money penalty. Following the entry of such order and assessment, the Commission shall request entry of a final judgment pursuant to Fed. Rules Civ. Proc., Rules 54 and 58.

VII.

This Court shall retain jurisdiction over this action for all purposes, including for purposes of entertaining any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court, including, but not limited to, the relief requested by the Commission in its Complaint.

VIII.

This Order may be served upon Benefund by mail either by the United States Marshal, the Clerk of the Court, or any member of the staff of the Securities and Exchange Commission.

IX.

There being no just reason for delay, the Clerk of this Court is hereby directed to enter, pursuant to Rule 55 of the Federal

Rules of Civil Procedure, to enter this Default Judgment as to Defendant Benefund forthwith and without further delay.

SIGNED this 25 day of SETTEMBLES, 1997.

MIES O. ELLISON-

UNITED STATES DISTRICT JUDGE

DATE 9-25-97

Phil Lombardi, Clerk U.S. DISTRICT COURT

# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GALINO LOPEZ,	)
Petitioner,	) )
vs.	) Case No. 97-CV-7-K(J)
RON CHAMPION, as Warden of the Disck Conner Correctional Center,	FILED
Respondent.	SEP 2 5 1997

#### REPORT AND RECOMMENDATION

Petitioner brought this *pro se habeas corpus* action pursuant to 28 U.S.C. § 2254(a). While incarcerated at the Dick Conners Correctional Center in Hominy, Oklahoma in August 1995, Petitioner was charged with and found guilty of inappropriate sexual activity. Petitioner's conviction resulted in the loss of 180 days of previously-earned good time credits and the imposition of 30 days of disciplinary segregation.

Petitioner argues that the procedures used to determine whether he was guilty of the charged misconduct deprived him of a liberty interest without due process in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioner seeks a writ of habeas corpus ordering Respondent to expunge the misconduct conviction from Petitioner's prison record and to restore the good time credits Petitioner lost because he was unlawfully convicted of the misconduct.

Respondent was ordered by the Court to respond to Petitioner's petition. [Doc. No. 5]. Respondent filed his response, and he argues that this habeas corpus action should be dismissed because Petitioner has failed to exhaust his available state remedies. See 28 U.S.C. § 2254(b)(1)(A). Petitioner argues that § 2254(b)'s exhaustion requirement does not apply in this case because Oklahoma does not provide Petitioner with an adequate remedy. See 28 U.S.C. § 2254(b)(1)(B)(i). Relying on Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994), Petitioner argues that the Oklahoma Court of Criminal Appeals has held that the only remedy available in Oklahoma for good time credit violations is a writ of habeas corpus and that the writ can be granted only if reinstatement of the good time credits would entitle Petitioner to an immediate release from custody. Petitioner argues that because he would not be entitled to immediate release, it would be futile to require him to first submit his claims to an Oklahoma court.

The undersigned does not agrees with Petitioner's statement of Oklahoma law. The undersigned finds that under current Oklahoma law, Petitioner may file an action seeking a writ of *mandamus* to compel the appropriate prison officials to provide Petitioner with a disciplinary hearing that provides the process due him under the Fourteenth Amendment. Because *mandamus* is an adequate state remedy under the facts of this case and because Petitioner has not exhausted that remedy, the undersigned recommends that this *habeas corpus* action be **DISMISSED** pursuant to 28 U.S.C. § 2254(b)(1).

#### I. FACTUAL BACKGROUND<sup>1/</sup>

On August 7, 1995, Petitioner's wife came to visit him in jail. Officer John Barrick alleges that during the visit he saw Petitioner kiss his wife's right breast. Officer Barrick filed a report and a disciplinary hearing was held on August 11, 1995 to determine if Petitioner was guilty of the charged misconduct. Petitioner was found guilty and 180 days of previously-earned good time credits were revoked and Petitioner received 30 days of disciplinary segregation.<sup>2</sup>/

Petitioner argues that the process he received in connection with this disciplinary hearing did not satisfy the requirements of the Fourteenth Amendment. Petitioner alleges that he was not permitted to present any live witness at the hearing. Petitioner was, however, permitted by the hearing officer to present written statements. Petitioner alleges further that he was not allowed to call as witnesses, either personally or through written statements, other inmates, visitors or officers present at the time of the alleged misconduct. Petitioner also challenges the sufficiency of the evidence to support a guilty finding. Petitioner argues that Officer Barrick's statement is uncorroborated and it is the only evidence against him. Petitioner also alleges that the hearing officer was biased and that he failed to give detailed reasons for his decision to take Officer Barrick's word over Petitioner's.

<sup>1/</sup> The facts summarized in this section are taken from Petitioner's pleadings.

Petitioner's visitation privileges were also suspended for 180 days.

# II. PETITIONER HAS AN ADEQUATE REMEDY UNDER OKLAHOMA LAW WHICH HE MUST EXHAUST BEFORE SEEKING RELIEF IN THIS COURT.

### A. 28 U.S.C. § 2254's EXHAUSTION REQUIREMENT

Federal courts are prohibited from issuing writs of *habeas corpus* on behalf of prisoners in state custody unless and until the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) & (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, <u>by any available procedure</u>, the question presented." 28 U.S.C. § 2254(c) (emphasis added). <u>See Picard v. Conner</u>, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

Section 2254's exhaustion requirement is a federalism-based limitation on a federal court's discretionary power to issue a writ of *habeas corpus*. The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law. The exhaustion requirement is satisfied only when the prisoner seeking *habeas corpus* relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Darr v. Burford, 339 U.S. 200 (1950); Duckworth v. Serrano, 454 U.S. 1 (1981); Rose v. Lundy, 455 U.S. 508 (1982); and Coleman v. Thompson, 501 U.S. 772 (1991). As § 2254 states,

exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief.

### B. MANDAMUS IS AN AVAILABLE AND ADEQUATE REMEDY UNDER OKLAHOMA LAW.

Petitioner argues that his exclusive remedy in Oklahoma is an action for a writ of habeas corpus.<sup>3/</sup> Petitioner argues further that the Oklahoma Court of Criminal Appeals has ruled that a writ of habeas corpus may not be issued unless the relief granted by the writ would entitle the prisoner to an immediate release from custody. In his response to Respondent's motion to dismiss, Petitioner argues that even if the Court restores all of his good time credits in this action, he would not be entitled to an immediate release from custody. Petitioner argues, therefore, that Oklahoma would not provide him an adequate remedy because he would not be entitled to habeas corpus relief under Oklahoma law.

Petitioner's assertion that a writ of *habeas corpus* is his exclusive remedy under Oklahoma law is wrong. In <u>Waldon v. Evans</u>, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals "abandoned the view that the only remedy available for sentence credit right violations is a writ of habeas corpus when entitlement to immediate release can be shown. A writ of mandamus is appropriate against prison officials when a prisoner's minimum due process rights have been violated." <u>Johnson v. Department of Corrections</u>, 916 P.2d 264, 265 (Okla. Crim.

<sup>3/</sup> See 12 Okla. Stat. §§ 1331-55 for the statutes governing habeas corpus procedure in Oklahoma.

App. 1996). "Mandamus provides a vehicle for inmates to insure due process is provided within the Department of Corrections disciplinary system . . . ." <u>Id.</u> (citing Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994)). In Oklahoma, prisoners are clearly permitted to assert, by way of a petition for writ of mandamus, that during a disciplinary hearing prison officials did not comply with the minimum requirements of the Fourteenth Amendment's due process clause.<sup>4</sup>/

Petitioner argues that he was not allowed to present live witnesses and he was not allowed to present certain witnesses who presumably had exculpatory information. Petitioner also asserts that the hearing officer was biased and failed to give adequate reasons to support his decision. These are claims by Petitioner that he was denied the procedural due process required by the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Petitioner also argues that there is insufficient evidence to support the decisions reached in the three disciplinary hearings. This is a claim by Petitioner that the evidence used to convict him does not pass muster under Superintendent. Massachusetts Correctional Institution v. Hill, 472 U.S. 445 (1985).

See <u>Dunn v. Ramsey</u>, 936 P.2d 347, 349 (Okla. Crim. App. 1997); <u>Waldon</u>, 861 P.2d 311, 313 (Okla. Crim. App. 1993) (holding that "a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated."); <u>Canady</u>, 880 P.2d at 400 (holding that "the inmate has the writ of mandamus to force prison officials to provide him with constitutional procedural due process . . . "); and Rule 10.6(B) of the Rules of the [Oklahoma] Court of Criminal Appeals (citing <u>Waldon</u> and stating that "[m]andamus is also appropriate to ensure procedural Due Process requirements are followed in administrative proceedings.").

Wolff outlines the minimum procedural safeguards required for prison disciplinary proceedings. In a prison disciplinary hearing involving the revocation of a liberty interest, an inmate must be given (1) advanced, written notice of the alleged misconduct; (2) the right to present evidence and witness in his defense if doing so would not be unduly hazardous to institutional safety or correctional goals; and (3) a written statement by the fact finder detailing the reasons for the decision reached and the evidence relied on in making the decision. Wolff, 418 U.S. at 563-67.

Hill holds that the requirements of due process are satisfied only if there is "some" evidence to support the disciplinary tribunal's decision. Id. at 455-56.6/

All of Petitioner's claims are grounded on the argument that prison officials failed to provided him minimum due process at his disciplinary hearings. Petitioner's "due process" claims are precisely the types of claims the Oklahoma Court of Criminal Appeals has recognized as appropriately brought in a petition for writ of *mandamus*. Petitioner does, therefore, have an available and adequate remedy under Oklahoma law. Under 28 U.S.C. § 2254(b)(1)(A) and (c), Petitioner must first exhaust his Oklahoma *mandamus* remedy before seeking relief from this Court.

#### **CONCLUSION**

Petitioner has an available and adequate remedy under Oklahoma law -- a mandamus action. In a mandamus action, an Oklahoma court will review Petitioner's claim that he was denied due process at his disciplinary hearings. Petitioner must first exhaust his Oklahoma mandamus remedy before seeking relief from this Court. Consequently, the undersigned recommends that this action be **DISMISSED**.

Applying the "some" evidence standard does not require an examination of the entire record, an independent assessment of witness credibility, or the weighing of evidence. The relevant inquiry is whether there is <u>any</u> evidence in the record to support the conclusion reached by the disciplinary tribunal. <u>Hill</u>, 472 U.S. at 455-56.

#### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

IT IS SO ORDERED.

Dated this 25 day of September 1997.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the Day of

Sam A. Joyner

United States Magistrate Judge

CHARLES L. BOYD,	)
Plaintiff,	)
vs.	) No. 96-CV-1083-K
WILLIAM LAFORTUNE, District Attorney, JEFF CARLSON, Assistant District Attorney, STATE OF OKLAHOMA,	FILED  SEP 2 5 1997
Defendants.	Phil Lombardi, Clerk U.S. DISTRICT COURT

#### ORDER

Plaintiff paid the filing fee to commence this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. In his complaint, Plaintiff claims that Defendants, the Tulsa County District Attorney and his assistant, did not have jurisdiction to file charges against him and that Defendants continued with a malicious prosecution knowing there was no jurisdiction to prosecute Plaintiff. Plaintiff has also filed a "motion for an injunction on possible mandamas (sic) move by state district attorney" (doc. #4), an "application of settlement order to Tulsa County District Courts and its administrative houses of function as 'al' within the said order" (doc. #6), an "ex parte application" (doc. #7), requesting the assistance of the United States Attorney "Stephan C. Lewis or his successor in office" to complete the litigation Plaintiff has begun, and a "request for case status" (doc. #12). Plaintiff contends he is entitled to monetary relief in the sum of \$1,000,000 for allegedly wrongful prosecution and prejudicial prosecutorial conduct.

Defendants have answered and filed their motion to dismiss, or in the alternative, for summary judgment (Docket #15). Defendants argue that they are absolutely immune from damages sought

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under 42 U.S.C. § 1983, and that Plaintiff has failed to plead an "essential element" necessary to hold them liable in a § 1983 action. For the reasons stated herein, the Court finds that Defendants' motion to dismiss should be granted and the complaint dismissed.

#### Discussion

As a preliminary matter, the Court notes that Plaintiff's Complaint does not contain a declaration that the statements made therein are offered under penalty of perjury.

On April 26, 1996, almost seven (7) months prior to the filing of this complaint, the Prison Litigation Reform Act (PLRA) was enacted. Pursuant to 42 U.S.C. § 1997e(c)(1), as amended by the PLRA, "[t]he Court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 [], or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility if the . . . action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."

For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Defendants have moved to dismiss this action on the basis of absolute prosecutorial immunity.

State prosecutors, such as the Defendants in this case, are entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994) (citation omitted). Of course, "'actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor.'" DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (quoting Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2615 (1993)). Indeed, the Tenth Circuit has repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute immunity. Gagan, 35 F.3d at 1475.

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (i.e., absolute and qualified immunity), we have held "the determinative factor is 'advocacy' because that is the prosecutor's main function." <u>Pfeiffer</u>, 929 F.2d at 1490 (quoting <u>Rex</u>, 753 F.2d at 843); <u>Spielman v. Hildebrand</u>, 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the State's case, the less likely it is that absolute immunity will attach." <u>Pfeiffer</u>, 929 F.2d at 1490 (citing <u>Snell</u>, 920 F.2d at 687).

Id. at 1476.

Applying these principles to the case at hand, the Court concludes that Defendants' actions contributing to the decision to file charges against Plaintiff constitute the type of conduct protected by absolute immunity. A prosecutor's exercise of discretion in deciding whether to initiate a prosecution concerns the judicial phase of the criminal process. Imbler, 424 U.S. at 430. "Moreover, because the immunity depends not upon the defendant's status as a prosecutor but upon 'the functional nature of the activities' of which a plaintiff complains, immunity for performance of inherently prosecutorial functions is not defeated by allegations of improper motivation such as malice, vindictiveness or self-interest." Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1989)

(citation omitted), <u>cert. denied</u>, 484 U.S. 828 (1987). Similarly, Plaintiff's allegations of "wrongful prosecution" and "conduct prejudical (sic) to administration of justice" must fail because they represent an attempt to impose damages for acts encompassed in the initiation of a criminal prosecution.

Having liberally construed Plaintiff's pro se pleadings, the Court concludes that this action lacks an arguable basis in law and fails to state any constitutional violations. See generally West v. Atkins, 487 U.S. 42, 48 (1988) (plaintiff must allege constitutional violation to state a § 1983 claim); Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1996) (conclusory allegations of equal protection violation insufficient to withstand dismissal under Fed.R.Civ.P. 12(b)(6)). Moreover, the actions of William LaFortune and Jeff Carlson in their respective capacities as District Attorney and Assistant District Attorney for the County of Tulsa are absolutely immune for purposes of this section 1983 action. Therefore, pursuant to 42 U.S.C. § 1997e(c)(1), Plaintiff's complaint should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (doc. #15) is granted, and this action is hereby dismissed with prejudice for failure to state a claim upon which relief may be granted. All other pending motions (doc. #4, #6, #7, #12 and #15-2) are denied as moot.

SO ORDERED THIS 24 day of September, 1997.

TERRY C. KERN, Chief Judge

UNITED STATES DISTRICT COURT

CANDACE D. LOY	)
Plaintiff,	)
v.	) No. 97-c-252-K
JOHN W. LEWIS, an individual and ALBERTSON'S INC., a Delaware	FILED
Corporation  Defendants.	SEP 2 5 1997
	) Phil Lombardi, Clerk U.S. DISTRICT COURT

#### **ADMINISTRATIVE CLOSING ORDER**

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 23 day of September, 1997.

TERRY C. KÆRN

UNITED STATES DISTRICT JUDGE

ADMINISTRATIVE C	U.S. DISTRICT COLOR
Defendants.	$\langle \qquad \qquad \langle \qquad \qquad \rangle$
DOUBLETREE HOTEL a corporation in the state of Delaware, et al.,	$\left.\begin{array}{c} \mathbf{FIL} \mathbf{ED} \end{array}\right)$
V.	NO. 95-CV-627-H
Plaintiff,	) DATE <u>4-25-47</u>
MEI CHU SORY,	ENTERED ON DOCKET

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by November 24, 1997, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 247 day of September, 1997.

Sven Erik Holmes

United States District Judge

TRICT COURT OF OKLAHOMA	FILED
	- LF 9 /
Case No. 97-C-50	U.S. DISTRICT COURT
ENTER	ED ON DOCKET
DATE	9-25-97

**ORDER** 

This matter comes before the Court on Defendant's motion to dismiss (Docket # 5).

Defendant's motion was filed on June 27, 1997. The Court also entered a minute order on

September 12, 1997, stating that Plaintiff must respond to Defendant's motion to dismiss by

September 22, 1997. The Court directed that if Plaintiff did not respond by that date that the matter would be deemed confessed and Defendant's motion would be granted.

Pursuant to Local Rule 7.1(C), a party opposing a motion has fifteen days after the filing of the motion in which to respond. Failure to timely respond authorizes the Court to deem the matter confessed. Plaintiff has still failed to respond to either Defendant's motion or the Court's order. Accordingly, Defendant's motion to dismiss (Docket # 5) is hereby granted.

IT IS SO ORDERED.

CURTIS MULLINS,

J.B. HUNT TRANSPORT, INC.,

V.

Plaintiff,

Defendant.

This 24 day of September, 1997.

Sven Erik Holmes

United States District Judge

# NORTHERN DISTRICT OF OKLAHOMA FILED

BANT BRYAN BAIRD,	SEP 2 4 1997 (7)
Petitioner,	Phil Lombardi, Clerk U.S. DISTRICT COURT
vs.	) Case No. 97-CV-107-H(J)
RON WARD, as Warden of the Oklahoma State Penitentiary,	ENTERED ON DOCKET
Respondent.	DATE 9-25-97

#### REPORT AND RECOMMENDATION

Petitioner brought this *pro se habeas corpus* action pursuant to 28 U.S.C. § 2254(a). While incarcerated at the Dick Conners Correctional Center in Hominy, Oklahoma in November 1995, Petitioner was charged with and convicted on three separate misconduct charges. Petitioner's convictions resulted in the loss of good time credits and the imposition of disciplinary segregation.

Petitioner argues that the procedures used to determine whether he was guilty of the charged misconduct deprived him of a liberty interest without due process in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioner seeks a writ of habeas corpus ordering Respondent to expunge the misconduct convictions from Petitioner's prison record and to restore the good time credits Petitioner lost because he was unlawfully convicted of the misconduct.

Respondent has filed a motion to dismiss, which is now before the Court. [Doc. No. 8]. Respondent argues that this action should be dismissed because Petitioner has

failed to exhaust his available state remedies. See 28 U.S.C. § 2254(b)(1)(A). Petitioner argues that § 2254(b)'s exhaustion requirement does not apply in this case because Oklahoma does not provide Petitioner with an adequate remedy. See 28 U.S.C. § 2254(b)(1)(B)(i). Petitioner alleges that the Oklahoma Court of Criminal Appeals has held that the only remedy available in Oklahoma for good time credit violations is a writ of habeas corpus and that the writ can be granted only if reinstatement of the good time credits would entitle Petitioner to an immediate release from custody. Petitioner argues, therefore, that it would be futile to require him to first submit his claims to an Oklahoma court.

The undersigned does not agrees with Petitioner's statement of Oklahoma law. The undersigned finds that under current Oklahoma law, Petitioner may file an action seeking a writ of *mandamus* to compel the appropriate prison officials to provide Petitioner with a disciplinary hearing that provides the process due him under the Fourteenth Amendment. Because *mandamus* is an adequate state remedy under the facts of this case and because Petitioner has not exhausted that remedy, the undersigned recommends that Respondent's motion to dismiss be **GRANTED** and that this *habeas corpus* action be **DISMISSED** pursuant to 28 U.S.C. § 2254(b)(1).

<sup>1/</sup> Petitioner relies on <u>State v. Woods</u>, 624 P.2d 555 (Okla. Crim. App. 1981); and <u>Canady v. Reynolds</u>, 880 P.2d 391 (Okla. Crim. App. 1994) for this proposition.

#### I. FACTUAL BACKGROUND<sup>2/</sup>

Petitioner argues that the process he received in connection with three disciplinary hearings did not satisfy the requirements of the Fourteenth Amendment. The three disciplinary hearings were held to determine whether Petitioner was guilty on three separate charges of battering a corrections officers. The first charge was for the alleged battery of Officer Gary McClary on November 1, 1995. The second charge was for the alleged battery of Officer Eugene McCloud on November 9, 1995. The third charge was for the alleged battery of Officer Tom Phillips also on November 9, 1995.

#### A. McClary Battery Charge

On November 1, 1995, Officer McClary was conducting a shakedown of Petitioner's cell. During the shakedown, Officer McClary discovered a package in Petitioner's shoe. Before Officer McClary could examine the package, Petitioner flushed the package down the toilet in his cell. Petitioner alleges that he did so because he did not want Officer McClary to find the contraband/tobacco that was in the package. Officer McClary alleges that he attempted to retrieve the package from Petitioner's toilet and that when he attempted to do so, Petitioner kneed him in the left cheek and forearm and shoved him against the wall. Petitioner denies ever touching Officer McClary and alleges that he simply placed his leg against the wall to prevent Officer McClary from finding the tobacco.

The facts summarized in this section are taken from Petitioner's pleadings. At this stage of the proceedings, there are no other evidentiary materials in the record.

Petitioner's disciplinary hearing on the McClary battery charge was held on November 7th and 8th of 1995. Petitioner was found guilty of battering Officer McClary and sentenced to 30 days of disciplinary segregation and the revocation of 70 days of previously-accrued good time credits. Petitioner alleges that he was not permitted to present any live witness at the hearing. Petitioner was permitted by the hearing officer to present a written statement of his cell mate at the time of the alleged incident and a statement of one correctional officer present at the time of the incident. Petitioner alleges further that he was not allowed to call as witnesses, either personally or through written statements, other inmates and officers who were near his cell at the time of the alleged incident and who could purportedly testify about what happened and about how Officer McClary looked physically right after the alleged incident.

Petitioner also challenges the sufficiency of the evidence to support a guilty finding. Petitioner argues that Officer McClary is lying and that Petitioner's witnesses, who were excluded by the hearing officer, would have corroborated Petitioner's version of the incident in question. Officers other than Officer McClary gave testimony at the hearing, which corroborated Officer's McClary's version of the incident in question. Petitioner argues that none of these officers were in a position to see what happened during the incident in question and that they are simply lying and conspiring with Officer McClary to frame Petitioner for the alleged battery.

#### B. McCloud Battery Charge

On November 9, 1995, Officer Eugene McCloud brought Petitioner a sack lunch and gave it to Petitioner through the "beanhole" in his cell door. Officer McCloud alleges that as he was handing Petitioner the sack lunch, Petitioner attempted to grab him through the beanhole. Petitioner admits that he became irate when he was given a sack lunch instead of a regular tray and that he did reach for Officer McCloud through the beanhole. Petitioner alleges, however, that Officer McCloud slammed the beanhole on Petitioner's arm and Petitioner never in fact touched Officer McCloud.

Petitioner's disciplinary hearing on the McCloud battery charge was held on November 15, 1995. Petitioner was found guilty of battering Officer McCloud and sentenced to 30 days of disciplinary segregation. No good time credits were revoked as a result of this conviction.

Petitioner alleges that there is insufficient evidence to support a conviction for the offense charged. In particular, Petitioner argues that the offense of battery, as defined by prison regulations and applicable Oklahoma law, requires actual, physical contact. Petitioner points to Officer McCloud's statement in which Petitioner alleges Officer McCloud states that Petitioner "tried to," but did not actually, grab him.

#### C. PHILLIPS BATTERY CHARGE

On November 9, 1995 Officer Tom Phillips was escorting Petitioner to the medical unit. Officer Phillips alleges that while transporting Petitioner, Petitioner swung his handcuffed hands and struck Officer Phillips in the left, front shoulder. Petitioner's disciplinary hearing on the Phillips battery charge was held on November

15, 1995. Petitioner was found guilty of battering Officer Phillips and sentenced to 30 days of disciplinary segregation. No good time credits were revoked as a result of this conviction.

Petitioner argues that the hearing officer erred because he used evidence of Petitioner's prior battery of Officer McCloud, which occurred on the same day as the alleged battery of Officer Phillips, to find Petitioner guilty of battering Officer Phillips. Petitioner argues that the hearing officer's use of his prior conviction violates prison policies. According to Petitioner, under applicable prison policies, a prior conviction on a misconduct charge may only be used at the punishment stage and not at the guilt/innocence stage of a disciplinary hearing. Petitioner argues that the hearing officer's use of the prior battery conviction demonstrates that the hearing officer was biased and prejudiced against Petitioner.

Petitioner also alleges that there is insufficient evidence to support his conviction for battery of Officer Phillips. Petitioner argues that the only evidence in support of the conviction is Officer Phillips' statement. Petitioner argues that Officer Phillips' medical records do not demonstrate any injury. Petitioner also alleges that the hearing officer failed to give detailed reasons for his decision to take Officer Phillips word over Petitioner's.

# II. PETITIONER HAS AN ADEQUATE REMEDY UNDER OKLAHOMA LAW WHICH HE MUST EXHAUST BEFORE SEEKING RELIEF IN THIS COURT.

### A. 28 U.S.C. § 2254's EXHAUSTION REQUIREMENT

Federal courts are prohibited from issuing writs of *habeas corpus* on behalf of prisoners in state custody unless and until the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) & (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c) (emphasis added). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

Section 2254's exhaustion requirement is a federalism-based limitation on a federal court's discretionary power to issue a writ of habeas corpus. The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law. The exhaustion requirement is satisfied only when the prisoner seeking habeas corpus relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Darr v. Burford, 339 U.S. 200 (1950); Duckworth v. Serrano, 454 U.S. 1 (1981); Rose v. Lundy, 455 U.S. 508 (1982); and Coleman v. Thompson, 501 U.S. 772 (1991). As § 2254 states,

exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief.

### B. MANDAMUS IS AN AVAILABLE AND ADEQUATE REMEDY UNDER OKLAHOMA LAW.

Petitioner argues that his exclusive remedy in Oklahoma is an action for a writ of habeas corpus.<sup>37</sup> Petitioner argues further that the Oklahoma Court of Criminal Appeals has ruled that a writ of habeas corpus may not be issued unless the relief granted by the writ would entitle the prisoner to an immediate release from custody. In his response to Respondent's motion to dismiss, Petitioner argues that even if the Court restores all of his good time credits in this action, he would not be entitled to an immediate release from custody. Petitioner argues, therefore, that Oklahoma would not provide him an adequate remedy because he would not be entitled to habeas corpus relief under Oklahoma law.

Petitioner recently mailed the Court a letter, asking the Court to expedite a decision in this case. As a reason why this Court should give immediate attention to this case, Petitioner stated that the "requested relief in this case would discharged [sic] me as of July 1997[,] [i]f all lost earned credits and lost emergency time credits were restored." [Doc. No. 20]. It appears, therefore, that Petitioner would now be entitled to immediate release if all of his good time credits were restored. "Under Petitioner's

<sup>3/</sup> See 12 Okla. Stat. §§ 1331-55 for the statutes governing habees corpus procedure in Oklahoma.

There is currently not enough information in the record for the undersigned to determine what sentence Petitioner is serving, the actual number of good time credits lost, or whether the return of those (continued...)

view of Oklahoma law, he now has an adequate remedy -- he may file a habeas corpus action in Oklahoma and challenge the alleged unlawful revocation of his good time credits. See, e.g., State v. Wood, 624 P.2d 555, 559 (Okla. Crim. App. 1981); Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990); and Wallace v. Cody, 951 F.2d 1170 (10th Cir. 1991) (all holding that in Oklahoma a habeas corpus action is appropriate, at least when the relief requested would entitled the prisoner to an immediate release from custody). However, even if Petitioner were not entitled to an immediate release from custody if the relief he requests were granted, Petitioner has an adequate remedy available under Oklahoma law -- mandamus.

Petitioner's assertion that a writ of *habeas corpus* is his exclusive remedy under Oklahoma law is wrong. In <u>Waldon v. Evans</u>, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals "abandoned the view that the only remedy available for sentence credit right violations is a writ of habeas corpus when entitlement to immediate release can be shown. A writ of mandamus is appropriate against prison officials when a prisoner's minimum due process rights have been violated." <u>Johnson v. Department of Corrections</u>, 916 P.2d 264, 265 (Okla. Crim. App. 1996). "Mandamus provides a vehicle for inmates to insure due process is provided within the Department of Corrections disciplinary system . . . ." <u>Id.</u> (citing <u>Canady v. Reynolds</u>, 880 P.2d 391 (Okla. Crim. App. 1994)). In Oklahoma, prisoners are clearly permitted to assert, by way of a petition for writ of mandamus, that during

<sup>4/ (...</sup>continued)
credits would or would not entitled Petitioner to an immediate release form custody. At this stage of the proceedings, the undersigned is simply relying on Petitioner's allegations.

a disciplinary hearing prison officials did not comply with the minimum requirements of the Fourteenth Amendment's due process clause.<sup>5</sup>/

Petitioner argues that he was not allowed to present live witnesses and he was not allowed to present certain witnesses who presumably had exculpatory information. Petitioner also asserts that the hearing officer failed to give adequate reasons to support his decision. These are claims by Petitioner that he was denied the procedural due process required by the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Petitioner also argues that there is insufficient evidence to support the decisions reached in the three disciplinary hearings. These are necessarily claims by Petitioner that the evidence used to convict him does not pass muster under Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445 (1985). Hill holds that the requirements of due process are satisfied only if there is "some" evidence to support the disciplinary tribunal's decision. Id. at 455-56.7

See <u>Dunn v. Ramsey</u>, 936 P.2d 347, 349 (Okla. Crim. App. 1997); <u>Waldon</u>, 861 P.2d 311, 313 (Okla. Crim. App. 1993) (holding that "a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated."); <u>Canady</u>, 880 P.2d at 400 (holding that "the inmate has the writ of mandamus to force prison officials to provide him with constitutional procedural due process . . . "); and Rule 10.6(B) of the Rules of the [Oklahoma] Court of Criminal Appeals (citing <u>Waldon</u> and stating that "[m]andamus is also appropriate to ensure procedural Due Process requirements are followed in administrative proceedings.").

Wolff outlines the minimum procedural safeguards required for prison disciplinary proceedings. In a prison disciplinary hearing involving the revocation of a liberty interest, an inmate must be given (1) advanced, written notice of the alleged misconduct; (2) the right to present evidence and witness in his defense if doing so would not be unduly hazardous to institutional safety or correctional goals; and (3) a written statement by the fact finder detailing the reasons for the decision reached and the evidence relied on in making the decision. Wolff, 418 U.S. at 563-67.

Applying the "some" evidence standard does not require an examination of the entire record, an independent assessment of witness credibility, or the weighing of evidence. The relevant inquiry is whether there is <u>any</u> evidence in the record to support the conclusion reached by the disciplinary tribunal. <u>Hill</u>, 472 U.S. at 455-56.

All of Petitioner's claims are grounded on the argument that prison officials failed to provided him minimum due process at his disciplinary hearings. Petitioner's "due process" claims are precisely the types of claims the Oklahoma Court of Criminal Appeals has recognized as appropriately brought in a petition for writ of *mandamus*. Petitioner does, therefore, have an available and adequate remedy under Oklahoma law. Under 28 U.S.C. § 2254(b)(1)(A) and (c), Petitioner must first exhaust his Oklahoma *mandamus* remedy before seeking relief from this Court.

#### CONCLUSION

Petitioner has an available and adequate remedy under Oklahoma law -- a mandamus action. In a mandamus action, an Oklahoma court will review Petitioner's claim that he was denied due process at his disciplinary hearings. Petitioner must first exhaust his Oklahoma mandamus remedy before seeking relief from this Court. Consequently, the undersigned recommends that Respondent's motion to dismiss be **GRANTED** and this action be **DISMISSED**.

### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

IT IS SO ORDERED.

Dated this 23 day of September 1997.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

25th Day of September 1997

Sam A. Joyner

United States Magistrate Judge

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 24 1997 (Phil Lombardi, Clerk U.S. DISTRICT COURT

ENTERED ON DOCKET

GLORIA BOMAR and ROCHELLE WARD,

V.

Plaintiffs,

ASBURY UNITED METHODIST CHURCH, an Oklahoma Church,

Defendant.

### ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Asbury United Methodist Church ("Asbury") (Docket # 16). For the reasons set forth below, Defendant's motion is granted in part and denied in part.

I

Plaintiff Gloria Bomar, a former employee of Asbury, filed this action, based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and 42 U.S.C. § 1983<sup>1</sup>, arising out of alleged sexual harassment by her supervisor, William Claxton, during the period of her employment with Asbury. For purposes of this motion, the parties agree to the following:

- 1. Plaintiff was employed by Asbury from February 7, 1995, to November 1995.
- 2. While employed at Asbury, plaintiff claims that she was discriminated against on the basis of her sex by her supervisor, and another employee of Asbury, William Claxton.<sup>2</sup>
- Initially, Mr. Claxton made "rude" and "funny" remarks to plaintiff, which she considered to be harmless flirtations; and nothing which she "couldn't handle."

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<sup>&</sup>lt;sup>1</sup> Plaintiff's claims under § 1981 and § 1983 have been abandoned by Plaintiff in her Response to Defendant's Motion for Summary Judgment and are not before the Court.

<sup>&</sup>lt;sup>2</sup> Mr. Claxton is no longer employed by Asbury.

- 4. Mr. Claxton did not make these remarks every time he saw Plaintiff, sometimes he would act very professional.
- 5. When Mr. Claxton made these remarks to Plaintiff, there were always alone, and he was careful to make them when they were alone.
- 6. In June, 1995, Mr. Claxton's behavior worsened. He began asking Plaintiff for kisses and dates, and made insinuations.
- 7. At this point, Plaintiff discussed Mr. Claxton's "off-colored remarks" with either John Armstrong or Roger Barnes, both of whom were on the custodial staff supervised by Mr. Claxton. She told no one else at Asbury.
- 8. On three occasions, Mr. Claxton grabbed Plaintiff.
- 9. On the first occasion, in June, 1995, Mr. Claxton "grabbed" Plaintiff in the dishwasher room at Asbury with both of his hands and tried to kiss her. After this happened, Plaintiff did not discuss this incident with anyone but Mr. Claxton and her brother.
- 10. The second occasion described by Plaintiff took place in a pantry, just off the kitchen. Plaintiff was in the pantry, Mr. Claxton came in and locked the door, grabbed Plaintiff and tried to kiss her. Plaintiff had to push him away. Plaintiff did not tell anyone at Asbury about this incident.
- 11. After this incident, Mr. Claxton followed Plaintiff home one night. Plaintiff told no one at Asbury about this incident.
- 12. The third occasion described by Plaintiff took place on July 16, 1995, and took place in the kitchen. Plaintiff was preparing a food tray and Mr. Claxton, was cutting bagels in half. Mr. Claxton said, "Do you know what I would like to do with this knife... I'd like to throw you up on this table and cut you from one end to the other... but not with the knife." Plaintiff began crying and Mr. Claxton left the kitchen.
- 13. Soon after this, within several days, Plaintiff told Jane Waddell, a secretary at Asbury, about what had happened and Ms. Waddell was shocked. She told Plaintiff she had to tell Phil Bright, the Asbury business administrator, about what had happened. Plaintiff and Ms. Waddell subsequently met with Mr. Bright and told him what had happened.

Defendant also alleges the following facts, which Plaintiff did not expressly dispute in her response to Defendant's brief in support of summary judgment:

14. Plaintiff has no facts or evidence to support her contention that Asbury in any way was aware of Mr. Claxton's discriminatory and harassing behavior, prior to her meeting with Mr. Bright, other than her "gut feeling."

- 15. The only individuals plaintiff can identify whom she believes were aware of Mr. Claxton's alleged discriminating and harassing behavior is Reverend William Mason and Jerry Himes, a former Asbury administrator.
- 16. Both Rev. Mason and Mr. Himes assert they were completely unaware of Mr. Claxton's alleged behavior as described by Plaintiff, until Plaintiff told Ms. Waddell and Mr. Bright about such alleged behavior after July 16, 1995. Neither Rev. Mason nor Mr. Himes ever witnessed Mr. Claxton behave or say anything inappropriate to a female employee or any other females, during their employment at Asbury. Further, Rev. Mason and Mr. Himes, as of July 16, 1995, did not possess any information, causing them to believe that Mr. Claxton might engage in the type of behavior described by Plaintiff.
- 17. Plaintiff agrees that since she did not tell anyone at Asbury about what had occurred, the church could not do anything about it.

Plaintiff alleges the following additional facts in her response, which Defendant does not dispute:

- 18. Alan Barnes assumed Mr. Claxton's duties as maintenance supervisor when Mr. Claxton was gone or on vacation.
- 19. Primarily, only Mr. Claxton and Mr. Barnes wore pagers in order for church staff to contact them regarding problems.
- 20. Mr. Barnes is now the director of maintenance at Asbury.
- 21. Rochelle Ward, also an employee of Asbury, told Mr. Barnes that Mr. Claxton sexually harassed her.
- 22. Mr. Barnes told Mr. Claxton about Ms. Ward's allegations.
- 23. Mr. Claxton told Plaintiff that she could be a supervisor if she went out with him.
- Asbury did not have a sexual harassment policy until Plaintiff revealed her allegations in July, 1995.

Plaintiff also alleges the following facts which Defendant denies:

- While employed at Asbury, Plaintiff was sexually harassed by her supervisor, Mr. Claxton.
- Mr. Claxton believed that he was a member of the Board of Trustees of Asbury and regularly attended its board meetings for the five or ten years until he left the church.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." <u>Id.</u> at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250

("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a

jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

Ш

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Discrimination on the basis of sex encompasses the actions of a supervisor harassing a subordinate because of his or her sex, and accordingly results in liability under Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986).

Plaintiff here advances both theories of liability under Title VII recognized in Meritor: (1) quid pro quo sexual harassment, and (2) hostile work environment sexual harassment. Meritor, 477 U.S. at 65-66. First, Plaintiff claims that Mr. Claxton's actions constituted quid pro quo sexual harassment in that Mr. Claxton told Plaintiff that she could become a supervisor at Asbury if she would submit to his sexual advances. Second, Plaintiff claims that Mr. Claxton's inappropriate and offensive behavior created a hostile work environment.

IV

As to Plaintiff's claim for quid pro quo sexual harassment, Defendant argues that summary judgment is appropriate because Mr. Claxton did not alter Plaintiff's work conditions as a result of her refusal to submit to his sexual demands. The only evidence submitted by Plaintiff in response to Defendant's motion for summary judgment is her allegation that Mr. Claxton told her

that she could be a supervisor if she kissed him or dated him -- a fact which Defendant does not contest. Applying the law to this sole fact, the Court finds that Plaintiff has not presented evidence sufficient to place her claim within the quid pro quo framework of Title VII. See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (describing a quid pro quo claim as one where concrete job benefits are conditioned on the employee's submission to sexual advances and that adverse job consequences result from employee's refusal to submit to the sexual conduct). Plaintiff does not contend, for example, that Mr. Claxton's requests that she kiss him and date him resulted in any adverse consequences to Plaintiff in the workplace or that any concrete job benefits were conditioned on Plaintiff's submission to his advances. Furthermore, the record does not suggest that Mr. Claxton's conduct in any way affected Plaintiff's professional advancement or aspirations. Accordingly, Defendant's motion for summary judgment as to Plaintiff's claim of quid pro quo sexual harassment is hereby granted.

V

As to Plaintiff's claim of hostile work environment sexual harassment, Defendant contends that it is entitled to summary judgment because Plaintiff did not inform it of Mr. Claxton's conduct and because no management-level employee at Asbury knew or had any reason to know of Mr. Claxton's conduct.<sup>3</sup> Defendant, citing a pre-Meritor decision, argues that employer liability for sexual harassment under Title VII exists only where the employer knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

See Def.'s Br. at 5-6 (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

However, since the Supreme Court's decision in Meritor, the bases for employer liability under Title VII have evolved beyond the framework urged by Defendant. The Tenth Circuit, in Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987), expressly held that, while an employer is not

<sup>&</sup>lt;sup>3</sup> Defendant has not moved for summary judgment on the grounds that no hostile work environment existed at Asbury and, for the purposes of this motion only, the Court assumes that Plaintiff is able to present a prima facie case of hostile work environment.

strictly liable under Title VII for the acts of its employees in creating a hostile work environment, an employer's asserted lack of notice is not an absolute defense to liability. Instead, claims of employer liability should be analyzed, in accordance with Meritor, in terms of principles of agency law. Hicks, 833 F.2d at 1417-19.

As the Tenth Circuit explained in <u>Hirschfeld v. New Mexico Corrections Dep't.</u>, 916 F.2d 572, 576 (10th Cir. 1990):

The court in <u>Hicks</u> identified three alternate bases for holding an employer liable for an agent's hostile work environment sexual harassment. The court explained that under the Restatement (Second) of Agency, "an employer is liable for any tort committed by an employee 'while acting in the scope of . . . [his or her] employment." <u>Id.</u> at 1417 (quoting Restatement (Second) of Agency § 219(1) (1958)). The court referred to two other relevant sections of the Restatement, <u>Id.</u> at 1418, which provide:

- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
- (b) the master was negligent or reckless, or
- (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he [or she] was aided in accomplishing the tort by the existence of the agency relation.

  Restatement (Second) of Agency § 219(2) (1958).

Id.

The Court will address each of these alternative bases for liability in light of the facts of the instant case. First, section 219(1) provides that an employer is liable for the torts of its agents committed while acting within the scope of employment. Id. at 1417. As noted in Hicks, however, that basis for liability is seldom invoked owing to the unlikely employment situation which must exist in order for this theory to apply. Id. at 1418 (stating that sexual harassment is "simply not within the job description of any supervisor or any other worker in any reputable business"). In the instant case, there is nothing in the record to support the claim that sexual harassment was within the scope of Mr. Claxton's employment.

Second, section 219(2)(b) provides that an employer is liable when it, as master, is negligent or reckless. In order to recover under this principle of agency law, a plaintiff must show

that the employer has failed to remedy or prevent a hostile work environment of which management-level employees knew, or in the exercise of reasonable care, should have known. Hirschfeld, 916 F.2d at 577 (finding that an employer which promptly responded following such notice was not negligent or reckless). However, "[g]enerally speaking, an employer will not be charged with constructive knowledge of the harassment merely because a supervisor is the perpetrator of the harassment." Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1444 (10th Cir. 1997).

Finally, section 219(2)(d), provides that an employer is liable where its servant purported to act or to speak on behalf of the principal and either there was reliance on apparent authority, or the servant was aided in accomplishing the tort by the existence of the agency relation. The Tenth Circuit recently has determined that section 219(2)(d) provides two independent bases of liability by which employers can be held accountable for their employees' acts. In order to recover under the first clause of the subsection, the plaintiff "must show that the employer manifested in [the supervisor] the authority to act on its behalf, that such manifestation resulted in harm to the plaintiff, and that the plaintiff acted or relied on the apparent authority in some way." Harrison, 112 F.3d at 1444 (citations omitted). The second clause will permit liability to attach "if the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment." Id, at 1446.4

In Harrison, the Tenth Circuit rejected the D.C. Circuit's interpretation of the second clause of section 219(2)(d) in Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995), adopting instead the Second Circuit's view in Karibian v. Columbia University, 14 F.3d 773 (2d Cir. 1994). Harrison, 112 F.3d at 1445. The Tenth Circuit explained the Second Circuit's view as follows: an employer will be liable if it delegates the authority to control the work environment to a supervisor who then abuses that delegated authority regardless of whether the employer had in place a sexual harassment policy effectively designed to negate any apparent authority to sexually harass. Id. In this view, a supervisor nonetheless retains actual power over his charges in the workplace. Id. Thus, if the supervisor "is able to misuse that power to create a hostile work environment, the employer will be liable for having placed him in the position to do so." Id. (citations omitted). The Tenth Circuit was careful to note, however, that liability does not attach

Applying these principles to the instant case, the Court finds that summary judgment is inappropriate under both the second and the third agency principles articulated in Hicks, and more fully, in Harrison. Under the second principle, section 219(2)(b), the facts pertinent to whether Asbury was negligent or reckless in its failure to respond to the alleged hostile work environment sexual harassment of its employees are controverted. There is evidence in the record that a former employee, Rochelle Ward, informed another employee, Mr. Barnes, that Mr. Claxton allegedly harassed her.<sup>5</sup> The parties dispute whether Barnes was a management-level employee for the purpose of notice to Asbury. Nevertheless, there is a question of material fact as to whether Asbury had actual notice of Mr. Claxton's prior conduct or acted negligently or recklessly with respect to Mr. Claxton, and therefore summary judgment is not appropriate on this issue.

Similarly, as to the third agency principle, section 219(2)(d), it remains a question of fact whether actual or apparent authority enabled Mr. Claxton to treat Plaintiff, and possibly Ms. Ward, in the way that he allegedly did. At this stage, the facts have not established whether Mr. Claxton possessed the apparent authority to harass employees. The parties agree that, prior to July 1995, Asbury had no policy dealing with sexual harassment. While the record is unclear to what extent Mr. Claxton exercised actual control over Plaintiff's work environment, there is evidence in the record that Plaintiff did not tell anyone at Asbury of Mr. Claxton's inappropriate

<sup>&</sup>quot;where the harasser's agency relationship merely provided him with proximity to plaintiff." Id. at 1446.

While Hicks makes it clear that a plaintiff may rely upon the harassment of other employees by a supervisor in order to establish the existence of a hostile work environment, Hicks, 833 F.2d at 1416, whether such evidence may be used to prove employer notice presents a different problem. Hirase-Doi v. U.S. West Communications, 61 F.3d 777, 783-84 (10th Cir. 1995) holds that whether a plaintiff may rely on evidence of prior harassment is determined by comparing the similarity of the conduct and the proximity in time to the harassment charged. Id. at 784. Defendant Asbury has not challenged Plaintiff's evidence of Mr. Claxton's alleged harassment of Ms. Ward under these guidelines but, for the purposes of summary judgment, the Court concludes such evidence raises a genuine issue of material fact as to whether Asbury knew or should have known of Mr. Claxton's behavior.

behavior because she feared she would lose her job, and because of her perception, perhaps shared by others, that Mr. Claxton "ran the church." Further, there is undisputed evidence in the record that Mr. Claxton urged Plaintiff to submit to his demands with suggestions that she might advance professionally if she did. This evidence creates issues of material fact as to whether Mr. Claxton possessed actual or apparent authority, and whether that authority enabled the alleged sexual harassment to occur. Accordingly, summary judgment is not appropriate on this issue.

For the reasons set forth above, Defendant's motion for summary judgment is hereby granted with respect to the issue of <u>quid pro quo</u> sexual harassment and denied with respect to the issue of hostile work environment sexual harassment.

IT IS SO ORDERED.

This 24<sup>7H</sup> day of September, 1997.

Sven Erik Holmes

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED

LUCILLE BOWIE on behalf of MARCUS D. BOWIE,

Plaintiff,

Plaintiff,

V.

CASE NO. 96-CV-495-M

SEP 2 : 1997

Phil Lombard, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF DIALAHOMA

Plaintiff,

CASE NO. 96-CV-495-M

ENTERED ON E TO TO THE SEP 2 5 1997

Defendant.

Defendant.

### **JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 24 day of 5ept, 1997.

FRANK H. McCARTHY

UNITED STATES MAGISTRATE JUDGE



## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 2 4 1997

Phil Lombardi, Cark U.S. DISTRICT COUR NORTHERN DISTRICT OF CRUMHOM

LUCILLE BOWIE on behalf of MARCUS D. BOWIE

Plaintiff,

vs.

JOHN J. CALLAHAN<sup>1</sup>, Acting Commissioner Social Security Administration,

Defendant,

Case No. 96-CV-495-M

ENTERED ON COURSE

SEP 2 5 1997

#### **ORDER**

Plaintiff, Lucille Bowie on behalf of Marcus D. Bowie, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>2</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. Winfrey v. Chater, 92

<sup>&</sup>lt;sup>2</sup> Plaintiff's protectively filed June 9, 1993 application for disability benefits was denied February 4, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 26, 1995. By decision dated May 22, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 21, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.



President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

F.3d 1017 (10th Cir. 1996); Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born October 31, 1979 and was 15 years old at the time of the hearing. He was attending 8th grade in special education. He claims to be unable to work as a result of injuries to his head and leg received when he was hit by an automobile. The statutory and regulatory criteria in effect at the time of the ALJ's decision required the decision maker to apply a four-step evaluation process to a claim of disability benefits made on behalf of a child. See 42 U.S.C. § 1382c(a)(3)(A)(1994), as implemented by 20 C.F.R. § 416.924(b)(1994). The ALJ denied benefits at step four of this process. He determined that although Marcus has

First, he had to determine whether the claimant was engaged in substantial gainful activity. See 20 C.F.R. § 416.924(c). If so, he was not disabled. Id. If the claimant was not engaged in substantial gainful activity, the ALJ had to determine whether he had a severe impairment. Id. § 416.924(d). If not, he was not disabled. Id. If the claimant had a severe impairment, the ALJ had to determine whether that impairment met or equaled an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (Listings). Id. § 416.924(e). If a Listing was met or equaled, the claimant would be deemed disabled. Id. If no Listing was met, the evaluation would proceed to the fourth step, where an individualized functional assessment (IFA) would be made to determine whether the claimant had an impairment or impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity. Id. § 416.924(f).

low average intelligence, mild quadriplegia, cerebral palsy, and was status post left femur fracture and closed head injury: "The evidence does not reflect and impairment of a degree of severity required to meet or equal any impairment listed in Appendix 1, Part A or B, Subpart P, Regulations No. 4. Specific emphasis has been given to Listing 112.5 - Mental retardation; and listing 111.07 - Cerebral palsy." [R. 19]. Further, although Marcus has a moderate impairment in cognitive skills and motor skills, it would not affect his ability to function independently, appropriately, and effectively in an age-appropriate manner. The ALJ concluded Marcus does not have an impairment or combination of impairments of comparable severity to that which would disable an adult, therefore he was not under a disability as that term is defined in the Social Security Act. [R. 24].

Subsequent to the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. No. 104-193, 110 Stat. 2105. The Act amended the standard for evaluating children's disability claims, as follows:

An individual under the age of 18 shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C). Section 211(d)(1) of the Act, found in the notes following 42 U.S.C.A. § 1382c, states that the new standard for evaluating children's disability claims applies to all cases which have not been finally abjudicated as of the effective date of the Act, August 22, 1996, including those cases in which a request

for judicial review is pending. Thus, the new version of the Act is applied to this case. *Brown v. Callahan*, \_\_\_ F.3d \_\_\_ (10th Cir. 1997), 1997 WL 459780.

The new version of the Act eliminates the fourth step in the analysis: determining whether the child has an impairment or impairments of comparable severity to that which would disable an adult. The Commissioner's new regulations implementing the Act reflect this change by providing that if the child's impairment or impairments do not meet, medically equal, or functionally equal in severity a listed impairment, the child is not disabled. See 20 C.F.R. § 416.924(d)(2)(1997). Therefore, analysis of the medical evidence in light of the Listings is of primary importance.

Plaintiff asserts that the ALJ's finding that Marcus does not have a listed impairment is not supported by specific weighing of evidence or reasons why he determined Marcus was not disabled at Step Three of the sequential evaluation procedure.

Before turning to the merits of Plaintiff's claim, the Court notes the Commissioner's argument that Plaintiff has waived this issue. The Commissioner cited the following from *James v. Chater*, 96 F.3d 1341, 1344 (10th Cir. 1996): "Issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." The Commissioner stated: "There is no indication in the record that Claimant received inadequate notice of his right to review by the Appeals Council," and concluded "Claimant's failure to bring this issue to the attention of the Appeals

Council effectively waived review of this issue by this Court." [Dkt. 12, p. 2-3]. The Commissioner urged the Court to "decline to review the present case," but "address[ed] Claimant's allegations below *merely as a convenience to this Court.*" [emphasis supplied]. *Id.* at 3.

The Commissioner's citation to *James* is inaccurate and misleading. The Commissioner's quotation from *James* omitted the first word of the sentence, "Henceforth." That omission dramatically changes the application of the waiver rule announced in *James*. In addition to prefacing its holding with the word "henceforth," elsewhere in its opinion the Tenth Circuit made it abundantly clear that it was announcing "a prospective rule" by specifically so stating. *James*, 96 F.3d at 1341. [emphasis supplied]. It is impossible to apply the *James* prospective rule to this case when the *James* opinion was issued on September 19, 1996, 16 months after the ALJ's May 22, 1995 decision and 4 months after the Appeals Council Action.

Furthermore, the Court notes that the *James* Court was unmistakably concerned that claimants be given notice that issues not raised may be deemed waived. "Henceforth, issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." *Id.* at 1344. [emphasis supplied]. The Commissioner states: "There is no indication in the record that Claimant received inadequate notice of his right to review by the Appeals Council." [Dkt. 12, p.2]. The *James* opinion makes it quite clear that notice of right to review is not the correct inquiry. The *James* Court unambiguously expressed its concern that litigants and their counsel

have notice of the potential for application of a waiver, either by a direct admonition to *pro se* claimants, or by published case law guidance for counsel. *James*, 96 F.3d at 1343-44. The Court has examined the Notice of Decision dated May 22, 1995, which explains Plaintiff's administrative appeal rights and notes that it does not inform Plaintiff that failure to raise issues before the Appeals Council could result in a waiver. [R. 14-16]. Therefore, regardless of the question of retroactive application of the rule, the Commissioner did not provide any notice that could reasonably be interpreted as suggesting that issues not presented to the Appeals Council may be deemed waived. The Court rejects the Commissioner's request that the *James* waiver rule be applied to this case. Contrary to the assertions made by the Commissioner's counsel, Plaintiff's arguments were not improperly raised, and addressing Plaintiff's allegations was not merely a convenience to the Court, but their duty.

In this case the ALJ stated: "The evidence does not reflect an impairment of a degree of severity required to meet or equal any impairment(s) listed in Appendix 1, Part A or B, Subpart P, Regulations No. 4. Specific emphasis has been given to Listing 112.05 - Mental retardation; and Listing 111.07 - Cerebral palsy." [R. 19]. Plaintiff argues that the holding in *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996), requires remand of this case for the ALJ to further analyze the medical evidence in the context of Listing 111.06 and 111.07. In *Clifton* the ALJ did not identify the relevant listings, discuss the evidence or his reasons for determining that the claimant was not disabled at step three. The Court reversed and remanded the case "for the

ALJ to set out his specific findings and reasons for accepting or rejecting evidence at step three." *Id.* at 1010.

In this case the ALJ identified the relevant listings. And, although he did not specifically outline the relevant Listing criteria, he did address some of them throughout his discussion of the medical evidence. Listing 111.06 requires:

Motor dysfunction (due to any neurological disorder). Persistent disorganization or deficit of motor function for age involving two extremities, which (despite prescribed therapy) interferes with age-appropriate major daily activities and results in disruption of:

- A. Fine and gross movements; or
- B. Gait and station.

20 C.F.R. Pt. 404, Subpt. P, App.1. Given that Marcus has a motor function deficit involving two extremities, Listing 111.06 requires that the motor function deficit interfere with age-appropriate major daily activities. The A! J outlined reports received from Marcus' special education teacher which stated that although Marcus walked with a serious limp, he had never complained about leg pain to his teacher. He was able to get to and from class without much difficulty, albeit more slowly than other children. He climbs stairs one at a time, but the teacher had never seen him fall. [R. 23, 139-140]. His mother completed a questionnaire in which she indicated that Marcus helped his brother and sister with meals and helped her with household chores such as washing dishes and washing clothes and that he did a good job. [R. 21, 89-90]. The ALJ found that Marcus has no limitation in personal or behavioral skills, he is able to help himself, take care of his personal needs and safety, respond appropriately to authority and school rules, and is able to learn new skills. The ALJ's

conclusion that the record does not reflect an impairment of a degree of severity that would substantially reduce his ability to attain developmental milestones at an age-appropriate rate; or engage in age-appropriate activities of daily living and self-care, play, recreation, sports, school and academics is supported by substantial evidence. This conclusion addresses the first criteria of Listing 111.06 and precludes a finding that his impairment meets that Listing.

However, the Court cannot conclude that the ALJ's decision contains an adequate discussion of Listing 111.07 criteria. Listing 111.07 requires:

Cerebral palsy. With:

A. Motor dysfunction meeting the requirements of 111.06 or 101.03;

Listing 101.03 requires:

Deficit of musculoskeleta! function due to deformity or musculoskeletal disease and one of the following:

A. Walking is markedly reduced in speed or distance despite orthotic or prosthetic devices;

One consultative examiner, Dr. Kramer, reported: "Non spastic mild quadriplegia, cerebral palsy: post concussive suspected." [R. 132]. Another consultative examiner, Dr. Mackey, reported: "Possible cerebral palsy involving both the lower extremities." [R. 142]. Dr. Mackey reported that Marcus "appears quite awkward in his stance and has difficulty standing for long periods. He is unable to run down the hall because of loss of control of both lower extremities." [R. 141]. Dr. Kramer observed that Marcus walked with an irregular unsteady gait and it appeared as if he was at risk of falling. He was unable to tandem walk, walk a line, toe walk, or fast

walk for more than a minute. [R. 131-32]. These entries are suggestive of the requirements of Listing 111.07 concerning cerebral palsy and of the criteria of Listing 101.03. Yet the ALJ's decision contains no discussion relating the medical evidence to these criteria. In the absence of ALJ findings supported by specific weighing of the evidence related to these listings, the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Marcus does not meet the Listing 111.07. *Clifton*, 79 F.3d at 1010. Accordingly, the case is REVERSED AND REMANDED for an analysis of the medical evidence as it relates to Listing 111.07.

In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995).

SO ORDERED this 24 day of September, 1997.

Frank H. McCarthy

UNITED STATES MAGISTRATE JUDGE

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IN THE HAUTED OTATED DIGHTIGH COLUMN	~ 4 D
IN THE UNITED STATES DISTRICT COURT FOR	THE SED OF 1997
IN THE UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF OKLAHOMA	or 3 = 1997/2
The state of the s	Phil Lomborn
	NORTHERN DISTRICT COURT
	Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

CAROLYN L. RENCH,	)
Plaintiff,	
v.	) CASE NO. 96-CV-517-M
JOHN J. CALLAHAN, Acting Commissioner of the Social Security	)
Administration,	ENTERED ON DOCUMENT
Defendant.	SEP 2 5 1997

### **JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 23 Rd day of \_\_\_\_\_\_, 1997.

FRANK H. McCARTHY

UNITED STATES MAGISTRATE JUDGE

SPR

IN THE UNITED STATES DISTRICT COURT ENTERED ON DOCKET FOR THE NORTHERN DISTRICT OF OKLAHOMA

PETER JOSEPH MCMAHON,

Petitioner,

- V S . -

DREW EDMONDSON, ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA.

Respondent.

FILED

SEP 2 3 1997

U.S. DISTRICT COURT

CASE NO. 96-CV-977-H

### NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE PURSUANT TO F.R.CIV. PRO. 41 (A)

Peter Joseph McMahon appears by counsel, John David Echols and Bryan Lester Dupler, pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure and respectfully notifies the Court and counsel of his voluntary dismissal of this habeas corpus proceeding without prejudice for the reasons stated below.

- 2. Relying on holding in U.S. v. Self, 876 F.Supp. 244 (D. Colo. 1995), aff'd, 85 F.3d 641 (10th Cir. 1996) and U.S. v. Garcia, 42 F.3d 537 (10th Cir. 1994), McMahon commenced both of these collateral challenges to his state court convictions as separate civil habeas corpus proceedings, alleging that the invalid enhancements caused his custody to violate the United States Constitution, pursuant to 28 U.S.C. § 2241 (c)(3).

CU

- 3. No adverse party in this action has served any answer or response to the petition or a motion for summary judgment. There voluntary dismissal by the Petitioner is authorized by F.R.Civ.Pro. 41 (a).
- 4. The Respondent in Case No. 96-CV-976-B, in the person of Oklahoma's Attorney General, filed a motion calling for the determination of the proper party respondent, reasoning that McMahon's discharge of the sentences and the limited use of those sentences for federal enhancement made the federal government the proper party to answer these claims. McMahon responded that either the State or Federal Government might be a proper party given the hybrid nature of his collateral challenge.
- Judge Brett did not reach the merits of that initial controversy, but instead dismissed Mr. McMahon's § 2241 petition without prejudice. Relying on Bradshaw v. Story, 86 F.3d 164 (10th Cir. 1996), Judge Brett held that Mr. McMahon's "exclusive remedy" for a collateral challenge to the state court convictions used to enhance his federal sentence is a motion pursuant to 28 U.S.C. § 2255 filed before the sentencing court in Case No. 94-CR-176-BU. Judge Brett disagreed with Mr. McMahon that § 2255 was an inadequate remedy, and thus also disagreed that McMahon could initiate a separate habeas proceeding to challenge the validity of his state court convictions.
- 6. The ability to litigate the issues raised by the habeas corpus petition in Case No. 96-CV-976-B and this case in a single § 2255 proceeding as suggested by Judge Brett and the Court of Appeals' opinion in *Bradshaw v. Story* is in the best interests of Mr. McMahon and is consistent with the interests of justice and judicial economy. Mr. McMahon therefore respectfully advises the Court that based upon Judge Brett's earlier ruling dismissing Case No. 96-CV-697-B without prejudice to its refiling as an action under § 2255 and the holding of *Bradshaw v. Story*; Mr. McMahon voluntarily dismisses this action without prejudice to pursue relief from these convictions in a single § 2255 motion to be filed in Case No. 94-CR-176-BU or such other proceedings as permitted by law.

WHEREFORE, for the reasons stated, and consistent with the requirements of F.R.Civ. Pro. 41 (a), Petitioner hereby voluntarily dismisses this action without prejudice.

### SIGNATURE OF COUNSEL & CERTIFICATE OF SERVICE

Respectfully submitted and mailed or delivered to

Steve Lewis United States Attorney 3600 U.S. Courthouse 333 W. 4th St. Tulsa, OK 74103

Drew Edmondson, Attorney General Sandra Howard, Chief, Criminal Div. 112 State Capitol Bldg. Oklahoma City, OK 73105

as of September 23, 1997.

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Bryan Lester Dupler, OBA # 14978 1625 Cross Center Dr. Norman, OK 73070

(405) 325-3331

Attorneys For Peter Joseph McMahon

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 2 8 1997

Phil Lombardi, Cierk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMI

CAROLYN L. RENCH

445-50-1269

Plaintiff,

VS.

Case No. 96-CV-517-M

JOHN J. CALLAHAN<sup>1</sup>, Acting Commissioner Social Security Administration,

Defendant,

SEP 2 4 1997

#### **ORDER**

Plaintiff, Carolyn L. Rench, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>2</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996); Castellano v. Secretary of Health & Human Servs., 26

Plaintiff's December 17, 1993 application for disability benefits was denied March 21, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 30, 1995. By decision dated April 12, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 14, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.



President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born June 20, 1950 and was 44 years old at the time of the hearing. She has an 11th grade education and formerly worked as a furniture factory worker and as a poultry plant worker. She claims to be unable to work as a result of pain in her shoulders, hands and feet. The ALJ determined that Plaintiff has a limitation in the use of her hands, but no limitation on her ability to walk or to stand. Although Plaintiff was unable to perform her past relevant work, she was capable of performing a full range of light work subject to no fine manipulation with her hands. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to accord appropriate weight to the opinion of her treating physician; (2) failed to perform a pain and credibility analysis in the manner required by law; (3) failed to demonstrate he considered all of the evidence in the case; and (4) improperly rejected Plaintiff's

complaints of pain with prolonged standing and walking as not supported by objective testing, but failed to order x-rays or other tests to either confirm or rebut her claim.

Plaintiff submitted additional evidence to the Appeals Council, as permitted by the relevant regulations. 20 C.F.R. § 404.970(b). The materials submitted included a letter dated July 18, 1995 written by Plaintiff's treating physician, Dr. Robert Sweeten, in which he expresses his opinion concerning Plaintiff's condition:

To whom it may concern:

Carolyn Rench has been followed through this office for approximately one year, and she has generalized osteoarthritis and fibromyalgia, manifested by severe pain and soreness in muscles and joints. These two conditions make any kind of activity, particularly the type of physical labor associated with the types of work that she is accustomed to performing, extremely painful and difficult. She is therefore, deemed unable to maintain gainful employment. It is also felt the patient is permanently and totally disabled.

[R. 16]. The Appeals Council denied review of the case, stating:

The Appeals Council has also considered the contentions raised in your representative's letter dated June 14, 1995, as well as the additional evidence from Robert Sweeten, M.D. dated July 18, 1995, but concluded that neither the contentions nor the additional evidence provides a basis for changing the Administrative Law Judge's decision.

[R. 13]. Dr. Sweeten's letter contained a new diagnosis: fibromyalgia. According to *Tabors Cyclopedic Medical Dictionary*, 17th Edition, fibromyalgia is: "Chronic pain in muscles and soft tissues surrounding joints." *Id.* at 729. The criteria for the classification of fibromyalgia published by the American College of Rheumatology are:

(1) history of widespread pain; and (2) pain in 11 of 18 tender point sites on digital palpation. *Id.* at 730.

Presumably, the Appeals Council conducted an examination of the merits of the entire record, including the new evidence, to reach its conclusion that the additional evidence fails to provide a basis for changing the ALJ's decision. See 20 C.F.R. § 404.970(b); Ramirez v. Shalala, 8 F.3d 1449, 1459 (9th Cir. 1993). The Tenth Circuit has ruled that "new evidence [submitted to the Appeals Council] becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994). Therefore, this Court is required to review Dr. Sweeten's letter to determine whether, even considering the letter, the ALJ's decision is supported by substantial evidence. The Court concludes that the decision is not supported by substantial evidence.

The ALJ based his determination that Plaintiff's complaints of disabling pain were not credible on: "the objective findings, or lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant that [sic] the hearing." [R. 28]. He also stated, "[t]he claimant has no medically proven impairments with respect to her upper or lower extremities, other than [Heberden's nodes in right hand and occasional bursitis in shoulder]. There is no objective basis for limiting the claimant's sitting, standing or walking." [R. 29].

Fibromyalgia, the condition which Plaintiff's treating physician states has afflicted Plaintiff, is diagnosed by ruling out other diseases through medical testing. See e.g. Lisa v. Dep't of Health and Human Servs., 940 F.2d 40, 44-45 (2d Cir. 1991). Therefore, negative test results or the absence of an objective medical test to diagnose the condition cannot support the conclusion that Plaintiff does not suffer from a potentially disabling condition. Since Plaintiff's treating physician has diagnosed fibromyalgia, the Court cannot say that the ALJ's decision is supported by substantial evidence. See Lantow v. Chater, 98 F.3d 1349 (Table), 1996 WL 576012 (10th Cir. (Okla.)).

Furthermore, the Court notes that the ALJ's statement that there were "no medical notes indicating foot problems" [R. 28] is not accurate. Dr. Poemoceah's note dated December 14, 1993, records "arthritis in feet." [R. 235]. On May 24, 1993 clinic notes reflect that Plaintiff complained of arthritic pain "all over." [R. 260]. Although there were no objective findings recorded, Darvon and Indocin were prescribed for pain. *Id.* On July 7, 1994, Plaintiff's subjective complaint of pain in her feet and knees was reported. [R. 259]. The examiner noted that she "can move, change positions, guarding somewhat when moving." *Id.* Indocin was again prescribed. The Court cannot find that the ALJ's credibility analysis has substantial support in the record when he based his determination in part on the "lack of medication for severe pain" but failed to discuss, or even acknowledge, that Plaintiff's physician has prescribed a narcotic medication, Darvon, for pain.

The decision of the Commissioner denying Plaintiff benefits is REVERSED and the case REMANDED to the Commissioner for further consideration. The Court expresses no opinion as to the extent of any alleged impairment, whether Plaintiff is or is not disabled within the meaning of the Social Security Act, or the weight to be accorded Dr. Sweeten's opinion.

SO ORDERED this 23Rd day of September, 1997.

Frank H. McCarthy

UNITED STATES MAGISTRATE JUDGE

DATE <u>9-83-91</u>

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER CHEM COAL COMPANY, a wholly owned subsidiary of INTERNATIONAL CHEMICAL COMPANY, INC., an Oklahoma corporation,

Plaintiff,

vs.

W.K. JENKINS, and COLONIAL BONDS, INC.,

Defendants.

No. 97-C-114-K

FILED

SEP 23 1997

ORDER

Phil Lombardi, Clerk U.S. DISTRICT COURT

This matter came on for case management conference on May 15, 1997, at which time the Court asked the parties to brief two issues. Such briefing has been completed. In a previous action before this Court, case no. 94-C-280-K, plaintiff sued defendant Jenkins as surety on a performance bond executed to the benefit of plaintiff. This Court granted the motion of the plaintiff for summary judgment, entering judgment on February 6, 1995, against defendant in the amount of \$150,000, the bond limitation.

Plaintiff has apparently been unsuccessful in executing upon the judgment, and has brought this new action against Jenkins and Colonial Bonds, Inc., the bond company, which is allegedly owned by Jenkins. The present action alleges "bad faith" failure to pay on the part of the defendants. At the case management conference, the Court asked the parties to brief (1) the existence of a "bad faith" tort in this area and (2) whether such a claim, even if valid, should have been brought in the first action. Plaintiff has filed

an initial and reply brief; defendant, appearing pro se, has filed his response brief.

Plaintiff's brief consists of an acknowledgement that Oklahoma recognizes a "bad faith" claim regarding insurance companies, see Christian v. Amer. Home Assur. Co., 577 P.2d 899 (Okla.1977), and a request to expand that rule to performance bonds. The Court's own research indicates a split of authority. Colorado, for example, has approved such an expansion in Transamerica Premier v. Brighton School, 940 P.2d 348 (Colo.1997), while Texas has rejected it. See Great Amer. Ins. Co. v. North Austin Util. Dist., 908 S.W.2d 415, 418-20 (Tex.1995). This Court need not "predict" what the ruling of the Supreme Court of Oklahoma would be, because the Court finds the other issue dispositive.

Claim preclusion operates to bar relitigation by the parties or their privies of issues which either were or could have been litigated in a prior action which resulted in a final judgment on the merits. Erwin v. Frazier, 786 P.2d 61, 64 (Okla.1989). See also King v. Union Oil Co., 117 F.3d 443, 445 (10th Cir.1997). Plaintiff's argument that it did not "realize" Jenkins was acting in bad faith until he refused to pay the judgment entered against him is untenable. Logically, any claim for bad faith accrued when payment was not made on the bond, not the subsequent judgment. The fact that plaintiff has had unexpected difficulty in collecting its judgment does not provide a basis for "splitting" its causes of action. The present complaint seeks to litigate an issue which could have been raised in the prior litigation.

It is the Order of the Court that this action is hereby DISMISSED.

ORDERED this 22 day of September, 1997.

TERRY C. KERM Chief UNITED STATES DISTRICT JUDGE

#### **ENTERED ON DOCKET**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATE 9-23-97

ERIC DeWAYNE ABERNATHY,

Petitioner,

Respondent.

vs.

No. 97-C-77-K

STEPHEN KAISER, et al.,

) } FILED

SEP 23 1997 /

ORDER

Phil Lombardi, Clerk U.S. DISTRICT COURT

On September 4, 1997, Magistrate Judge Joyner entered his Report and Recommendation regarding the Respondent's motion to dismiss the petitioner's motion for habeas corpus relief. The Magistrate Judge recommended the motion be granted, on the ground petitioner has failed to exhaust his state court remedies. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motion of the Respondent to dismiss (#4) is hereby GRANTED. This action is dismissed without prejudice.

ORDERED this 22 day of September, 1997.

TERRY C. KERN, Chief

UNITED STATES DISTRICT JUDGE

### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDWARD H. LEWIS,	)		FILED
Plaintiff,	) )		SEP 2 2 1997
v.	)		Phil Lombardi, Clerk U.S. DISTRICT COURT
	)	Case No. 96-C-523-B	
JOHN J. CALLAHAN,	)		
COMMISSIONER OF SOCIAL	)	•	
SECURITY,1	)	ENT	TERED ON DOCKET
Defendant.	j	DAT	SEP 2 3 1927

#### REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying plaintiff's application for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge James D. Jordan (the "ALJ"), which summaries are incorporated herein by reference.

<sup>&</sup>lt;sup>1</sup>Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.<sup>3</sup> He found that claimant was impaired by lower back problems, severe enough to reduce his ability to work. The ALJ concluded that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for occasional lifting of more than 20 pounds, frequent lifting of more than 10 pounds, sitting and walking for more than two hours at a time,

<sup>&</sup>lt;sup>2</sup>Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>&</sup>lt;sup>3</sup>The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

<sup>1.</sup> Is the claimant currently working?

<sup>2.</sup> If claimant is not working, does the claimant have a severe impairment?

<sup>3.</sup> If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.

<sup>4.</sup> Does the impairment prevent the claimant from doing past relevant work?

<sup>5.</sup> Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

<sup>20</sup> C.F.R. § 404.1520 (1983). <u>See generally, Talbot v. Heckler</u>, 814 F.2d 1456 (10th Cir. 1987); <u>Tillery v. Schweiker</u>, 713 F.2d 601 (10th Cir. 1983).

frequent standing, working at unprotected heights and around moving machinery, and working in environments containing exposure to noxious fumes and extremes in heat. He found that claimant's impairments and residual functional capacity precluded him from performing his past relevant work as a handyman/general laborer, welder, auto mechanic, and carpet layer/contractor. He found that the claimant was 48 years old, which is defined as a younger individual, that he had a ninth grade education, and that in view of his age and residual functional capacity, the issue of transferability of work skills was not material. He concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy which he could perform, such as solderer at the sedentary and light level and solderer supervisor. Having determined that there were jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's decision that the claimant's impairments did not meet or equal a listed impairment is not supported by the clear weight of the evidence.
- (2) The ALJ improperly evaluated the claimant's pain and other non-exertional impairments.
- (3) The ALJ erroneously held that the claimant could perform light work.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has been unable to work since October 15, 1993, due to severe low back pain with radiation into the right leg (TR 67). He also complains of right hip pain, joint pain, leg cramps, kidney stones, recurrent urinary tract infections, problems with fumes and gases, headaches, problems with his teeth, depression, and poor memory (TR 343-351).

Claimant originally sought treatment for lower back pain in 1981 when he was injured on the job site (TR 122). He was admitted to the hospital on March 4, 1981 and x-rays revealed that he had an extruded disc at the lumbosacral level (TR 94-103). He was discharged due to personal problems, but was readmitted on March 22, 1981 for surgery on his lower back (TR 95, 104-112). He underwent a bilateral partial laminectomy and discectomy at the lumbosacral level and improved somewhat (TR 105, 113).

From 1981 to 1994, claimant was seen by several doctors for continued lower back problems. Dr. W.F. Phelps examined him on July 19, 1982, and determined that he had a 20% permanent partial impairment to the body as a whole as a result of his back complaints and lumbar fusion. The doctor concluded: "[i]t is my medical opinion that this man is unable to engage in unrestricted activities. This patient probably could engage in work activity which required no stooping and bending." (TR 115).

Claimant was seen by Dr. John Vosburgh from February 13, 1981 to October 27, 1982 (TR 117-121). A May 11, 1982 myelogram was normal (TR 119). On October 27, 1982, the doctor stated that claimant's examination was normal (TR 117). The doctor found that due to the "significance of this injury, and the residual pain that it may cause him affecting his ability to bend, stoop, and lift I rate him as having a 25% permanent partial impairment to his body." (TR 117).

On March 11, 1983, claimant was examined by Dr. John A. Karr, who stated that he was suffering from a 55% permanent impairment to the dorso-lumbo-sacral spine due to his 1981 injury (TR 131). The doctor further stated that claimant was "a good candidate for rehabilitation to a more sedentary type of work." (TR 132).

Dr. Thomas A. Chandy treated claimant for "chronic low back pain" from January 28, 1985 to June 10, 1987 (TR 133). Dr. Chandy noted:

Straight leg raise is 75% bilateral. Sensation, motor power is equal and symmetric. His reflexes are equal. His flexion is restricted by 60%. His right and left rotation is restricted by 50% and extension restricted by 40%. X-ray shows narrowing of L-5, S-1 disc space where the fusion was . . . . In my opinion this patient will not be able to do any outdoors job. He will not be able to do any job involving more than between 30 and 40 pounds, and will be unable to be on his feet for more than 3 to 4 hours at one time. I recommend that he is trained for some type of indoors job, either a sitting type of factory job or an office kind of occupation.

(TR 133).

On June 25, 1990, claimant was hospitalized for organophosphate exposure and poisoning after walking through a cloud of insecticide (TR 137-151). He was

treated with medication, and "further signs of organophosphate poisoning had completely disappeared by the morning after admission." (TR 137).

On July 23, 1992, Dr. John Ellis reported that he had examined claimant, who complained of fatigability, headaches and short-term memory loss, which he believed to be symptoms from the insecticide poisoning (TR 154-162). The doctor found claimant to be alert and oriented, able to repeat 7, 9, 4, 3 forwards and backwards, and cooperative and honest in giving a very thorough medical history (TR 158). Dr. Ellis' diagnosis was "long-term sequelae from organic phosphate poisoning with complex integrated cerebral function disturbance due to brain and peripheral nervous system damage" and "sensitivity to volatile hydrocarbons and pesticides." (TR 161). Dr. Ellis stated that claimant would have difficulty being around certain chemicals for the rest of his life, which would interfere with his ability to work (TR 162). Further, "his ability to work is also going to be significantly affected the rest of his life due to his fatigue and brain damage." (TR 162).

On December 22, 1993, claimant was admitted to the hospital and diagnosed with "lower back pain with P/O radiculopathy." (TR 169-173). MRI images revealed the following:

Postoperative change at L5-S1 with no definite disc protrusion and no definite spinal stenosis. At L4-5, there is very severe hypertrophy of the facet joints. There appears to be a large, extreme lateral, disc protrusion at the L4-5 level on the right side which would [sic] appear to significantly compromise the neutral foramen. This may be the cause of the patient's clinical problem. There is also mild spinal stenosis being produced at this level.

(TR 169).

On March 10, 1994, Dr. Varsha Sikka performed a right L4-5 hemilaminectomy with microdiskectomy on claimant (TR 184-186, 286-290).

The patient had postoperatively significant weakness in this right lower extremity with a 1/5 motor strength to dorsiflexion and plantar flexion with significant hypesthesia and hypalgesia to pain. The patient was started on Solu-Medrol dose pack on the night of operation and received occupational and physical therapy the following day. The patient had rapid improvement with approximately 2-3 +/5 strength by the time of discharge on 3/14/94. The patient also stated that he had somewhat better bladder control with better sensation. The patient insisted on being discharged on 3/14/94 since he had a business that possessed many tools and he wanted to make sure that his personal property and effects were intact.

(TR 185) (emphasis added).

On July 22, 1994, Dr. Sikka examined claimant and found that:

The patient has tenderness in the lumbosacral spine, mostly in the right sacroiliac joint and in the lumbar sacral paraspinal muscles. There is no spasm or warmth noted. Range of motion of the lumbosacral spine is limited. He has some exaggerated behavior. Flexion, extension, and lateral rotation was not able to be assessed due to his exaggerated behavior. Straight leg raising is positive on the right at 30 degrees, Extension test and Patrick's test were not able to be assessed completely as he has very exaggerated behavior . . . . Strength in both upper extremities is within normal limits. Strength in the left lower extremity is within normal limits . . . . The patient has slightly weak dorsiflexor, 4/5, on the right . . . . Gait is slow. There is no atrophy or wasting noted. Romberg is negative.

(TR 189) (emphasis added).

Dr. Sikka noted that claimant had been taking extra-strength Tylenol since the March 1994 surgery (TR 187). Her impression was pseudoarthrosis and L5 radiculopathy (TR 189). Dr. Sikka stated that claimant "could do any kind of sedentary work where he does not have to stand too long, lift more than 30 lbs.,

walk too long, or handle heavy objects. His hearing and speech is within normal limits. He could do some traveling. He does not have any mental impairment." (TR 189).

On July 25, 1994, Dr. Jim Carlin examined claimant and found that "the lumbar spine appears stable in flexion and extension. Again noted is a posterior osteophyte growth into the neural foramina of L5-S1 which appears unchanged. There is no significant change when compared to the previous exam." (TR 195).

At a hearing on April 6, 1995, claimant testified that he has a constant aching in his back and numbness in his leg and foot all the time (TR 344, 346-347). He stated that he has not seen a doctor since the previous summer (TR 347). He testified that he mowed laws, put shocks on a car, and did other small jobs until a couple of weeks before the hearing (TR 334-335). He said that he drives every day, either to the grocery store or to take his girlfriend to work, and he drove to Oklahoma City for medical reasons (TR 337-339). He also testified that he went fishing on the weekend before the hearing (TR 339). He stated that he can walk a quarter of a mile, stand for 5 to 7 minutes, sit in a comfortable chair for 30 minutes, and lift 10 pounds (TR 352-354).

There is no merit to claimant's contentions. The ALJ did not err in finding that claimant was not medically disabled under the criteria of § 1.05(C) of the Listing of Impairments, Appendix 1, 20 C.F.R. Part 404, Subpart P. For a claimant to show that his impairment matches a listing, it must meet all of the specified medical criteria.

Sullivan v. Zebley, 493 U.S. 521, 530 (1990). "An impairment that manifests only some of those criteria, no matter how severely, does not qualify." Id.

Section 1.05C of 20 C.F.R. 404.1599 Subpt. P, App. 1, entitled "Disorders of the Spine: Other Vertebrogenic Disorders," requires a condition that is expected to last twelve months and includes the following diagnosed symptoms: pain, muscle spasm, and significant loss of motion in the spine along with significant motor loss with muscle weakness, and sensory and reflex loss. The ALJ's determination is consistent with the medical assessment presented at the hearing by Dr. Harold Goldman, the medical expert. Dr. Goldman found that claimant had some limitation of spinal motion, but he did not view it as significant (TR 372). Dr. Goldman could find no medical records that indicated that claimant had muscle spasms, and he could "find no evidence of muscle atrophy or significant muscle weakness." (TR 372).

Dr. Sikka's evaluation of the claimant found range of motion of the lumbosacral spine to be limited, but stated that there was no spasm or warmth noted (TR 189). Dr. Sikka also found that the strength in the claimant's lower left extremity was within normal limits, and that claimant had slightly weak dorsiflex of four over five on the right (TR 189). Dr. Goldman noted that this is about the least weakness a person can have (TR 370). Dr. Goldman further noted that he could find no restrictions placed on the claimant from University Hospital staff or other recent treating physicians (TR 371). No physician ever reported that claimant was disabled or unable to work. The ALJ's finding that claimant did not have a listed or equivalent impairment is supported by substantial evidence.

There is also no merit to claimant's contention that the ALJ improperly evaluated the claimant's pain and other non-exertional impairments. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987).

The ALJ relied on the Social Security guidelines, as well as the ruling in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), in reaching his conclusion that claimant's complaints of disabling pain were not credible (TR 19-20). The court in Luna discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the

claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

ld. at 165-166.

Because there was some objective medical evidence to show that plaintiff had a lower back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Id. at 163; 42 U.S.C. §423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Id. at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 F.2d at 517.

The ALJ discussed claimant's complaints in detail, and he properly concluded that the claimant's subjective complaints of pain and other symptoms were not disabling (TR 20). The ALJ explained that "[p]ostoperative diagnostic studies of the lumbar spine show no encroachment of the neural foramina." (TR 20). He noted that claimant shows no appetite disturbance, does not use a cane or other assistive device, and uses over-the-counter Tylenol for pain (TR 20). He further noted that claimant's daily activities include driving his girlfriend to and from work, driving to the grocery store and doctor's appointments, and preparing small meals (TR 20).

The ALJ also considered claimant's testimony that he "continues to perform small jobs, including mowing lawns and performing minor repair work on cars. e.g., putting shocks on a car . . . in the last 3 to 4 months, he has performed 6 to 7 small

iobs. He also looks over cars for people, advising them about their cars such as repair work." (TR 20). The ALJ also noted that claimant maintains social contacts and had been fishing and camping during the weekend prior to the hearing (TR 20). There was substantial evidence to support his conclusion that "the claimant's level of daily activities are not so restricted as to be indicative of severe, disabling pain." (TR 20).

The ALJ also considered claimant's complaint that the organophosphate exposure and poisoning had caused him to suffer fatigue and brain damage and properly found that there was not documentation in the record that claimant had a mental impairment related to the exposure (TR 19). The ALJ based his opinions on the testimony of the medical expert, Dr. Goldman, and the evaluation of Dr. Sikka, both of whom found that the claimant had no mental impairment (TR 19, 189, 371). He found that the conclusion of Dr. Ellis that claimant had a brain dysfunction was not supported by his own objective findings or the medical opinions of other doctors (TR 19, 161-162). However, based on the claimant's testimony that working around noxious fumes and extremes of heat gave him headaches, the ALJ properly restricted the claimant from working in these environments (TR 19).

Finally, there is no merit to claimant's contention that the ALJ erroneously held that the claimant could perform light work. "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations.

Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy,

and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. This regulation provides that:

"Light work" involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

The ALJ considered the opinions of the consultative physician, Dr. Sikka, and the medical expert, Dr. Goldman. Dr. Sikka found that claimant would be restricted from standing too long, lifting more than 30 pounds, walking too long, or handling heavy objects (TR 189). Dr. Goldman found that claimant could not lift more than 35 pounds occasionally and 25 pounds frequently, that he could not sit or walk for more than 2 hours at one time, that he could occasionally stand and occasionally crawl, and that he could not work at unprotected heights or around moving machinery (TR 373). As the ALJ noted, "[t]hus, Dr. Sikka's assessment of the claimant's functional abilities is consistent with the limitations set forth by Dr. Goldman." (TR 18).

Based on the opinions of these two physicians, the ALJ found that claimant could perform light work, but was restricted from sitting or walking for more than 2 hours at one time, standing more than occasionally, and working at unprotected heights and around moving machinery (TR 18). He also restricted claimant from

working around noxious fumes and extremes of heat more than occasionally due to claimant's testimony that these environments give him headaches (TR 19).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision should be affirmed.

Dated this <u>19<sup>NE</sup> day of *Septembel*</u>, 1997

IOHN LEO WAGNER

UNITED STATES MAGISTRATE JUDGE

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CERTIFICATE OF SERVICE

The undersigned cartifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their atterneys of record on the

Phil Lombardi, Clerk

	NITED STATES DISTRICT RTHERN DISTRICT OF OR	<i>D</i>
CHARLES A. FIELDS,	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Petitioner,	) )	
vs.	) Case No. 96	5-CV-125-C
RON CHAMPION,	) )	
Respondent.	)	ENTERED ON DOCKET
	ORDER	DATE SEP 2 3 1997

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #14) filed on March 25, 1997, in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Respondent's motion to dismiss for filing successive petition (Docket #4) be granted and the petition for writ of habeas corpus be denied. On May 27, 1997, Petitioner filed his objection to the Report.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed <u>de novo</u> those portions of the Report to which the Petitioner has objected, and has concluded that, for the reasons discussed below, the Report should be adopted and affirmed.

#### **BACKGROUND**

On June 10, 1994, Petitioner was sentenced in Tulsa County District Court after pleading guilty in Case Nos. CRF-87-4637, CRF-87-4639, and CRF-88-306. The second page of the Information listed a 1984 prior felony conviction as two separate convictions for enhancement

(j)

purposes. At the sentencing hearing, Petitioner's counsel argued that the felony acts in the prior convictions were transactional and should, therefore, be considered as one single felony conviction for enhancement purposes. The state trial court judge rejected counsel's single transaction argument and ruled that Petitioner had two prior felony convictions mandating imposition of a minimum sentence of twenty years in CRF-88-306 and CRF-87-4639, and ten years in CRF-87-4637. The state trial court judge ordered the sentences to be served concurrently.

Petitioner failed to withdraw his guilty pleas and failed to perfect a direct appeal. Although Petitioner sought post-conviction relief, the Oklahoma Court of Criminal Appeals affirmed the state district court's denial of relief, finding that Petitioner had defaulted his claims and had not asserted a sufficient reason for his failure to appeal his convictions.

In a previous federal petition for writ of habeas corpus filed in this district in Case No. 94-C-440-K, Petitioner alleged that during his state trial court proceedings, he was provided ineffective assistance of counsel and that his sentences were improperly enhanced through the use of two prior felony convictions which actually arose from the same criminal transaction, in violation of Okla. Stat. tit. 21, § 51(B). On July 18, 1995, the federal district court denied habeas relief finding that Petitioner had received effective assistance of counsel and that he could not demonstrate cause and prejudice to overcome the procedural default of his improper enhancement claim. On January 16, 1996, in case no. 95-5157, the Tenth Circuit Court of Appeals affirmed the denial of habeas relief.

Petitioner now brings nearly identical arguments in the instant petition. Respondent has moved for dismissal, asserting that the identical issues raised in the prior habeas petition were denied on the merits and that Petitioner's filing of the instant petition constitutes abuse of the writ.

Petitioner argues that he is actually innocent of the fact of the two prior felony convictions used to enhance his sentence and that the "ends of justice" would be served by reconsideration of the claim.

#### DISCUSSION

If valid, Petitioner's claim of actual innocence of the prior conviction would bring this case into the fundamental miscarriage of justice exception to the doctrine of procedural default justifying federal habeas review. See Herrera v. Collins, 506 U.S. 390, 404 (1993) (The Court stated that "a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."); see also Selsor v. Kaiser, 22 F.3d 1029, 1035-36 (10th Cir. 1994); Mills v. Jordan, 979 F.2d 1273, 1279 (7th Cir. 1992). Petitioner argues that the two prior convictions used to enhance his sentence involved two automobile burglaries which occurred in close temporal and geographical proximity to one another. According to Petitioner, the two burglaries actually constituted a single criminal transaction and cannot result in two separate felony convictions. Thus, it is Petitioner's contention that since he is innocent of the fact necessary to sentence him as a habitual offender, i.e., the second prior conviction, his sentence was improperly enhanced and that to deny federal habeas review on the basis of procedural default constitutes a fundamental miscarriage of justice. See Mills, 979 F.2d at 1279 (7th Cir. 1992).

After carefully analyzing the factual basis of Petitioner's claim and thoroughly reviewing the relevant law, the Magistrate Judge concluded that there is no merit to Petitioner's contention that his

two prior convictions arose from a single transaction. To the contrary, the burglaries involved different property targets in different geographic locations, with different victims. Furthermore, there was a time lapse between the commission of the burglaries. The burglaries were clearly separate incidents involving separate intents to commit a wrong. The case law cited and discussed by the Magistrate Judge supports the conclusion that the two burglary convictions constituted two separate felony convictions for enhancement purposes. Therefore, the Court agrees with the conclusion of the Magistrate Judge and finds that Petitioner's claim of actual innocence fails and his petition for writ of habeas corpus should be denied.

#### **CONCLUSION**

Petitioner's federal habeas claims have been previously denied on the merits. Although Petitioner now argues actual innocence of the prior sentence used to enhance his current sentences, the Court finds his claim fails and there has been no fundamental miscarriage of justice which justifies federal review of a procedurally defaulted claim. Therefore, the Court finds the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, Respondent's motion to dismiss for filing successive petition should be granted, and Petitioner's petition for writ of habeas corpus should be denied.

#### ACCORDINGLY, IT IS HEREBY ORDERED that:

- 1. The Report and Recommendation of the United States Magistrate Judge (#14) is adopted and affirmed.
- 2. Respondent's motion to dismiss for filing successive petition (#4) is granted.
- 3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

SO ORDERED THIS 22 day of September. 1997.

H. DALE COOK, Senior Judge

UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 9-23-97

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN L. DUBOIS,

Plaintiff,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

No. 96-CV-189-H

Defendants.

#### **ORDER**

Plaintiff, a state prisoner, filed this suit pursuant to 42 U.S.C. § 1983, alleging that the procedures used in his prison disciplinary proceeding violated his Fourteenth Amendment due process rights. He seeks a declaration that those procedures were unconstitutional, an injunction to prevent Defendants "from considering the unconstitutional misconduct against him," and expungement of the disciplinary misconduct from his prison record. Plaintiff expressly denies he is seeking damages or restoration of his revoked earned credits (#1, at 5; #6, at 2). Defendants have filed a motion to dismiss, or in the alternative, for summary judgment (#4). Plaintiff, appearing *pro se* and *in forma pauperis*, has objected to the Defendants' motion and to the Special Report filed by Defendants on May 20, 1996, as ordered by the Court. For the reasons stated herein, the Court finds that Plaintiff's Complaint should be dismissed.

#### **BACKGROUND**

Plaintiff's complaint stems from the events surrounding a January 31, 1995, shakedown at the Northeast Oklahoma Corrections Center ("NEOCC") at Vinita, Oklahoma, where Plaintiff was incarcerated, his resulting misconduct charge and subsequent disciplinary proceedings. The Special

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Report submitted by Defendants indicates that during the course of the NEOCC shakedown, several inmates became "verbal" and were soon joined by several other inmates, one of whom allegedly was Plaintiff. On February 10, 1995, an offense report was completed, charging Plaintiff with "group disruption," defined as "participation with others in a course of disorderly conduct with purpose to prevent or coerce official action." Oklahoma Department of Corrections (ODOC) policy #01-3. A disciplinary hearing was held on February 16, 1995. ODOC officials provided Plaintiff with written notification of the offense and investigative reports, the services of a staff representative, and the opportunity to call witnesses and present testimony. Plaintiff was found guilty of the rule infraction and, as a result, lost 90 days of earned credits and was sentenced to 30 days in disciplinary segregation.

Plaintiff, alleging he was innocent of the rule infraction, pursued all available administrative remedies within ODOC without success. On May 4, 1995, he filed a petition for a writ of mandamus in the District Court of Osage County, Oklahoma, case no. CJ-95-121. The state district court denied the mandamus action on August 10, 1995, ruling that Plaintiff failed to show that a constitutional violation had occurred. On February 8, 1996, the Oklahoma Court of Criminal Appeals affirmed the state district court's denial of the mandamus petition.

Plaintiff has now filed this action in federal court pursuant to 42 U.S.C. § 1983. Plaintiff alleges that Defendants have failed to provide the minimum due process requirements enunciated by Wolff v. McDonnell, 418 U.S. 539 (1974) and Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445 (1985) and have engaged in other conduct violative of his civil rights. Specifically, Plaintiff raises the following ten (10) counts in his complaint: Count I, Defendants failed to provide adequate notice; Count II, Defendants failed to provide adequate opportunity to marshal facts and evidence;

Count III, Defendants denied Plaintiff the opportunity to call more than two (2) witnesses; Count IV, Defendants failed to provide an adequate written statement concerning reliability of evidence; Count V, the hearing officer was deceitful and biased; Count VI, Defendants failed to provide the effective assistance of a staff representative; Count VII, the misconduct finding was based on Defendants' retaliation; Count VIII, the misconduct finding resulted from conspiracy by Defendants; Count IX, Defendants failed to provide an adequate administrative review; and Count X, Defendants failed to follow internal ODOC procedures during the NEOOC shakedown. Plaintiff seeks declaratory and injunctive relief as well as the expungement of the "unconstitutional disciplinary conviction" from his prison record (#1, at 5).

Defendants Steve Maxwell, Gary McClain, John Middleton, Charles Gallipeau, Jack Davis, Lorane Kramer, James Lohman, Dolores Ramsey, Randy Cook and Ronald J. Champion, have moved for dismissal for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(b). In particular, Defendants assert that Plaintiff is barred from relitigating his due process claims under <u>Jarrett v. Gramling</u>, 841 F.2d 354 (10th Cir. 1988), by operation of the existing final judgment in the state mandamus case. Defendants also contend Plaintiff's due process rights were not violated during the disciplinary hearing. Defendants specifically assert that ODOC officials provided Plaintiff with proper written notice of the charges against him, an opportunity to present witness and evidence testimony, and the assistance of a staff representative. Furthermore, according to Defendants, the "some evidence" standard as set out in <u>Superintendent, Mass. Correctional Inst. v. Hill</u>, 472 U.S. 445 (1985), was satisfied.

#### **ANALYSIS**

Plaintiff describes the nature of his claim as "involving several Due Process and Equal Protection claims arrising (sic) from a defective Disciplinary process where I was found guilty of a disciplinary misconduct without constitutional protections." (#1, at 2). He requests injunctive and declaratory relief as well as expungement of his disciplinary conviction (#1, at 5).

#### A. Declaratory relief pursuant to §1983

This Court must first determine whether Plaintiff's claims are cognizable under § 1983. Although Plaintiff argues the Court should allow his action to proceed as a § 1983 civil rights complaint, it is well-established that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]." Heck v. Humphrey, 114 S.Ct. 2364, 2372-2373 (1994).

In a recent decision, Edwards v. Balisok, 117 S.Ct. 1584 (1997), the Supreme Court discussed the applicability of the Heck standard in a § 1983 civil rights action arising from a prison disciplinary hearing. The Court specifically addressed the issue of whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983. Id., 1586. Balisok, a Washington state prisoner, was found guilty of prison rule infractions and sentenced to, *inter alia*, the loss of earned credits totaling 30 days. Alleging that the procedures used in his disciplinary proceeding violated his Fourteenth Amendment due process rights, he filed suit under 42 U.S.C. § 1983, seeking a declaration that those procedures were unconstitutional, compensatory and punitive damages as well as an injunction to prevent future violations. Balisok alleged that the hearing officer was deceitful

and biased, concealed exculpatory witness statements and refused to ask specified questions of requested witnesses. This conduct by the hearing officer prevented the introduction of extant exculpatory material and "intentionally denied" him the right to present evidence in his defense.

The Supreme Court held that where the principal procedural defect complained of would, if established, "necessarily imply the invalidity of the deprivation of [plaintiff's] good-time credits," plaintiff must prove that the finding of a disciplinary misconduct has been overturned before a § 1983 claim is cognizable. Balisok, 117 S.Ct. at 1587. Balisok's complaint alleged that the cause of the exclusion of the exculpatory evidence was the deceit and bias of the hearing officer. The Court noted that although the due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, "they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence." Id. (quoting Wolff, supra, 94 S.Ct. at 2981-2982). Citing the holdings of Wolff, supra, and Hill, supra, the Supreme Court concluded that Balisok's claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decision maker would necessarily imply the invalidity of the punishment imposed and, pursuant to Heck, was not cognizable under § 1983. Id.

The <u>Balisok</u> and <u>Heck</u> decisions also indicate that where a plaintiff alleges procedural due process defects which, if proven, would not necessarily imply the invalidity of the misconduct finding or the underlying conviction, those claims are cognizable under § 1983 and should be allowed to proceed, in the absence of some other bar to the suit. <u>See Balisok</u>, at 1587; <u>Heck</u>, 2372-73.

To summarize, if a plaintiff's § 1983 claim would "necessarily imply the invalidity of the punishment imposed [in the disciplinary hearing]," he must first demonstrate that the disciplinary

hearing decision has previously been invalidated. Heck, 114 S.Ct. at 2372. In other words, Plaintiff "must prove that the conviction [of group disruption] or sentence [disciplinary segregation and loss of earned credits] has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." Id. This is true not only when the prisoner challenges the judgment as a substantive matter but also when he challenges "procedures ... such as necessarily to imply the invalidity of the judgment." Balisok, 117 S.Ct. at 1587.

In the instant case, Plaintiff brings ten (10) claims of civil rights violations, each premised on an alleged due process violation. The Court must determine whether Plaintiff's allegations necessarily imply the invalidity of the misconduct finding.

#### 1. Alleged violation(s) necessarily implying invalidity of misconduct finding

In Count V of his complaint, Petitioner alleges the hearing officer "conspired" with the other defendants "to deprive plaintiff of his due process rights" when the hearing officer "pre-judged the evidence," "did not question plaintiff," "argu[ed] with plaintiff," and "did in fact decide the case against plaintiff prior to the hearing by refusing to allow gathering of evidence of exculpatory nature." (#1, at attachment C). This claim, if true, would necessarily imply the invalidity of the misconduct finding, as specifically recognized in <u>Balisok</u>, at 1588. In addition, Plaintiff alleges other defects which, if true, would necessarily imply the invalidity of the misconduct finding. These include: Count VII, misconduct finding based on retaliation; Count VIII, conspiracy by Defendants, and Count IX, inadequate review process because Defendants failed to "correct the complained of previous violations, ... entered into a conspiracy, ... and allowed the retalitory [sic] nature of the proceedings stand." In order for these claims to be cognizable under § 1983, Plaintiff must demonstrate that the

finding of misconduct has been expunged, declared invalid by a state court, or called into question by a federal court's issuance of a writ of habeas corpus. Id. Plaintiff has failed to make the necessary showing.<sup>1</sup> Therefore, Counts V, VII, VIII and IX of Plaintiff's § 1983 claim are not cognizable. Stated another way, those counts fail to state a cause of action because the "§ 1983 claim does not accrue until [plaintiff] has somehow invalidated the [disciplinary hearing]." Heck, 114 S.Ct. at 2373-74.

#### 2. Alleged violation(s) not necessarily implying invalidity of misconduct finding

Plaintiff has also alleged numerous violations of the minimum procedural due process requirements enunciated by the Supreme Court in Wolff and Hill. These violations include: Count I, inadequate notice; Count II, inadequate opportunity to marshal facts and evidence; Count III, denial of opportunity to call more than two (2) witnesses; Count IV, inadequate written statement concerning reliability of evidence; and Count VI, denial of effective assistance of staff representative. In Count X of his complaint, Plaintiff also alleges that Defendants failed to follow ODOC procedures during the shakedown in violation of his civil rights. If true, these defects would not necessarily imply the invalidity of the misconduct finding and theoretically would be cognizable in a § 1983 action. See Balisok, at 1587; Heck, 2372-73.

However, <u>Heck</u>, at 2372-73, provides that such claims should be allowed to proceed but only "in the absence of some other bar to the suit." As urged by Defendants, the Court finds these claims to be barred by the doctrine of claim preclusion.

In fact, the opposite is true. Plaintiff has shown that he presented these same issues to the state district court, which denied his mandamus relief and determined no due process violation had occurred. Plaintiff also presented evidence that he appealed the state district court's denial of his writ of mandamus. The state criminal appeals court affirmed the district court's decision, confirming there was no due process violation.

The claim-preclusive effect<sup>2</sup> of a state-court judgment in the context of a subsequent suit in federal court under § 1983 is determined by state law. <u>Jarrett v. Gramling</u>, 841 F.2d 354, 356 (10th Cir. 1988). Accordingly, the Court finds that in this § 1983 action, Oklahoma law determines the claim-preclusive effect of the judgment rendered in Plaintiff's state mandamus action.

Under Oklahoma law, a plaintiff can bring a mandamus action in state court seeking to obtain an order compelling the performance of an act. See Okla. Stat. tit. 12, §§ 1451-1462. "An order or ruling made in a [mandamus action], if it is in the nature of an adjudication of some contested claim or right, has the same effect as a bar, as a formal judgment." Jarrett, 841 F.2d at 357 (quoting Braine v. City of Stroud, 385 P.2d 428, 430 (Okla. 1963)). Additionally, pursuant to Okla. Stat. tit. 12, § 1460, if a plaintiff obtains a judgment in a mandamus action, he is entitled to recover damages which he sustained, to be ascertained by the court as in a civil action. Clearly, a plaintiff entitled to assert a § 1983 claim may do so in the mandamus action. Jarrett, at 357. Furthermore, pursuant to Oklahoma law, the final judgment in a mandamus action is conclusive between the parties not only as to all matters litigated and determined in the mandamus action, but also as to all matters which could or might have been litigated therein. See id., at 358. Therefore, a judgment rendered in a mandamus action bars a separate § 1983 action, arising from the same underlying cause of action, in

<sup>&</sup>lt;sup>2</sup>The general rule of claim preclusion has been stated as follows:

Where a second suit between the same parties or their privies is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated as well as those which could have been litigated.

Spence v. Latting, 512 F.2d 93 (10th Cir.), cert. denied, 423 U.S. 896 (1975) (recognizing the claim-preclusive effect of prior state-court judgments on a subsequent § 1983 action in federal court); see also Stovall v. Continental Fed. Sav. and Loan Ass'n, 635 P.2d 1336 (Okla. Crim. App. 1981).

the Oklahoma state courts.

Federal district courts are obligated "to give the same preclusive effect to a state-court judgment that the judgment would be given in the courts of the state in which the judgment was rendered." Id., at 356. This conclusion is premised on the Full Faith and Credit Act, 28 U.S.C. § 1738.<sup>3</sup> In other words, the existence of a state mandamus judgment bars a § 1983 claim arising from the same underlying cause of action in federal district court as well as in state court.

Prior to filing the instant § 1983 action, Plaintiff pursued a state mandamus action, alleging his due process rights were violated in the February 16, 1995 disciplinary hearing which resulted from a misconduct charge (#4, Ex. A). Plaintiff did not raise a § 1983 claim in that action. The District Court of Osage County "thoroughly studied" Plaintiff's petition for writ of mandamus, filed on May 4, 1995, and denied the petition on August 10, 1995, concluding that "[t]his Court can find nothing in the record to indicate that Petitioner was denied due process in the handling of the misconduct conviction." (#4, Ex. B).

Thereafter, Plaintiff filed an appeal in the Oklahoma Court of Criminal Appeals, seeking relief from the district court's order denying his petition for writ of mandamus and alleging certain district court procedural errors (#4, Ex. C). The Oklahoma appellate court found that Plaintiff was given proper written notice of the charge against him, was afforded an opportunity to gather and present evidence, and was provided the assistance of a staff representative and an investigator, who obtained

<sup>&</sup>lt;sup>3</sup>Section 1738 provides in pertinent part:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

written statements from witnesses on Plaintiff's behalf. In addition, that court found that Plaintiff failed to present any evidence, other than his own self-serving statements or opinions, to support his claims that the hearing officer was not impartial; that the evidence presented at the disciplinary hearing was insufficient to support Plaintiff's conviction; and that the written statement provided to Plaintiff inadequately described the evidence and reason for the disciplinary action. See Hill, 472 U.S. 445 (1985); Wolff, 418 U.S. 539, 564 (1974); Waldon, 861 P.2d 311, 313 (Okla. Crim. App. 1993). In its Order entered February 8, 1996, the Oklahoma Court of Criminal Appeals found that Plaintiff was not entitled to mandamus relief as he had "failed to establish any due process violation constituting a denial of a clear legal right" and affirmed the district court's denial of Plaintiff's petition for writ of mandamus (#4, Ex. D).

Although Plaintiff's instant § 1983 claims (that he is entitled to declaratory and injunctive relief and expungement of the misconduct because Defendants violated his due process rights during the disciplinary process) differ slightly from the claims asserted in the state mandamus action (that he is entitled to restoration of earned credits and a due process review of the disciplinary hearing decision), the underlying cause of action in both actions remains the same: the disciplinary proceeding following Plaintiff's misconduct charge violated Plaintiff's due process rights. Since Oklahoma law requires a claimant to pursue in a single action all claims and rights stemming from or arising out of a cause of action, Plaintiff was not only permitted to assert his instant § 1983 claims in the state mandamus action, but he was required to do so or risk being barred from asserting the claims in a subsequent action. The Court finds that the final judgment in Plaintiff's mandamus action is

<sup>&</sup>lt;sup>4</sup>Since the Oklahoma appellate court found Plaintiff was not entitled to mandamus relief, Plaintiff's claims concerning alleged procedural errors committed during the state district court proceeding were not addressed.

conclusive between the parties not only as to all matters litigated and determined in that action, but also as to all matters which could or might have been litigated therein. The state mandamus judgment bars a separate § 1983 action in the Oklahoma state courts and, pursuant to 28 U.S.C. § 1738, this Court must also give the judgment the same preclusive effect. Accordingly, the Court concludes that Plaintiff is barred from bringing this § 1983 action in federal court.

#### **B.** Injunctive Relief

Furthermore, Plaintiff is not entitled to the injunctive relief requested: "to enjoin Defendants from considering the unconstitutional misconduct conviction against me and that the unconstitutional disciplinary conviction should be expunged from my prison record." (#1, at 5). Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983. Balisok, at 1588. However, Petitioner has not shown that he meets the usual requirements for injunctive relief: that he will suffer irreparable injury and that he does not have an adequate remedy at law. O'Shea v. Littleton, 94 S.Ct. 669, 678 (1974). Nor has Plaintiff shown that he could fall victim again to the alleged unconstitutional practices he challenged. This, too, is fatal to his efforts to obtain injunctive relief. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975); O'Shea, 414 U.S. at 495-96. Therefore, injunctive relief is not available as "the principles of equity, comity, and federalism" restrain a federal court from issuing an injunction "against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is both great and immediate." Id. (quoting Younger v. Harris, 91 S.Ct. 746, 751 (1971)).

#### C. Habeas Corpus relief

To the extent Plaintiff's action seeks expungement, relief which could impact the duration of confinement, the Court liberally construes the § 1983 complaint as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Haines, 404 U.S. at 520-21. Furthermore, because Plaintiff has pursued his available state remedy, the Court finds that Plaintiff has met the exhaustion requirement of 28 U.S.C. § 2254(b). Nonetheless, Plaintiff has failed to present any evidence that he was denied "(1) advance written notice of the claimed violation, (2) a written statement by the factfinder as to the evidence relied on and the reasons for the disciplinary action, and (3) the right to call witnesses and present documentary evidence in his defense when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals." See Waldon v. Evans, 861 P.2d 311, 312 (Okla.Crim.App. 1993) (quoting Wolff v. McDonnell, 94 S.Ct. at 2978-2980). Nor has Plaintiff established a violation of the "some evidence" requirement of Superintendent, Mass. Correctional Institution v. Hill, 472 U.S. 445, 105 S.Ct. 2768 (1985).

Because Plaintiff fails to demonstrate a due process violation, the Court concludes that he is not entitled to expungement of the disciplinary misconduct from his prison record.

#### **CONCLUSION**

Counts V, VII, VIII, and IX of Plaintiff's § 1983 complaint necessarily imply the invalidity of the misconduct finding and Plaintiff has failed to show that the underlying misconduct has been invalidated pursuant to Heck and Balisok. Therefore, Counts V, VII, VIII, and IX are not cognizable under § 1983 and should be dismissed for failure to state a claim.

Counts I, II, III, IV, VI, and X of Plaintiff's § 1983 complaint do not necessarily imply the invalidity of the misconduct finding and would theoretically be cognizable in a § 1983 case. However, these claims are barred by the doctrine of claim preclusion and should be dismissed.

In addition, Plaintiff has not demonstrated that he is entitled to either injunctive relief or habeas relief, i.e., expungement of the misconduct from his record. Therefore, the Court concludes that Plaintiff's claims for injunctive and habeas relief should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (#4) is granted as to Counts I, II, III, IV, VI, and X of Plaintiff's § 1983 Complaint. Counts V, VII, VIII and IX are not cognizable under § 1983 and are dismissed with prejudice. Plaintiff's claims for injunctive and habeas relief are denied. Any and all other pending motions are denied as moot.

IT IS SO ORDERED.

This 22" day of SETEMBER

, 1997.

Sven Erik Holmes

United States District Judge

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

OLA FAYE CARTER, Individually and as mother and next friend of	FILED
KANEISHA CARTER, a minor,	SEP 2 2 1997
Plaintiffs,	Phil Lombardi, Clerk U.S. DISTRICT COURT
-VS-	) 97-CV-656 H (J)
ATLANTA CASUALTY COMPANY,	)
an Illinois Company,	) )
Defendant.	)

## ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Joint Application for Dismissal With Prejudice filed herein, the parties have stipulated that all questions and issues existing between the said parties have been fully and completely disposed of by settlement and have requested the entrance of an order of dismissal with prejudice.

IT IS SO ORDERED that the case should be and the same is hereby dismissed with prejudice and the matter fully, finally and completely disposed of.

DATED this 18 day of September, 1997.

JUDGE OF THE DISTRICT COURT

DATE 9-33-97

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAN GILBERT,	)
Plaintiff,	)
vs.	) Case No. 96 CV 861 H
CITY OF COLLINSVILLE, an	)
Oklahoma Municipal	)
Corporation; JACK HODGES;	FILED
KEVIN BYERS; M.W. McAFEE;	)
FRANK TURRENTINE; and	SEP 2 2 1997
DON ABLE,	)
	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)

## ORDER OF DISMISSAL WITH PREJUDICE

UPON the Joint Stipulation For Dismissal With Prejudice filed herein by the parties, it is hereby,

ORDERED, that this case is dismissed with prejudice.

DATED:

This \_\_\_\_\_\_\_\_day of September, 1997.

United States District Judge

Submitted by:

Leslie C. Rinn, OBA # 12160 HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C. 320 South Boston, Suite 400 Tulsa, Oklahoma 74103 (918) 594-0400 7

### IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff,

SEP 22 1997

Phil Lombardi, Clerk U.S. DISTRICT COURT

- 404-110-1

vs.

Case No. 96-C-445-BU

SHOP AND SAVE MARKET OF TULSA, INC.; FREIDA B. GRIFFIN; TROY W. GRIFFIN; GLENN W. OLTMAN, as personal representative of the Estate of Inger Sue Arnold, deceased; and FARMERS & MERCHANTS INSURANCE COMPANY,

Defendants.

ENTERED ON DOCKET DATE SEP 2 3 1997

## **JUDGMENT**

This matter came before the Court upon the Motion of Plaintiff Travelers Indemnity Company for Summary Judgment and Defendants Freida B. Griffin, Troy W. Griffin and Farmers & Merchants Insurance Company's Counter Motion for Summary Judgment and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendants Shop and Save Market of Tulsa, Inc., Freida B. Griffin, Troy W. Griffin, Glenn W. Oltman, personal representative of the Estate of Inger Sue Arnold, deceased, and Farmers & Merchants Insurance Company and against Plaintiff, The Travelers Indemnity Company, and that Defendants Shop and Save Market of Tulsa, Inc., Freida B. Griffin, Troy W. Griffin, Glenn W. Oltman, personal representative of the Estate of Inger Sue Arnold,



deceased, and Farmers & Merchants Insurance Company, are entitled to recover their costs of action.

DATED at Tulsa, Oklahoma, this 22 day of September, 1997.

MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

## IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN	DISTRICT	OF OKLAHOMA FILED	ļ
THE TRAVELERS INDEMNITY COMPANY,	)	SEP 22 1997	)_
Plaintiff,	) ) )	Phil Lombardi, Clerk U.S. DISTRICT COURT	
vs.	)	Case No. 96-C-445-BU	
SHOP AND SAVE MARKET OF TULSA, INC.; FREIDA B. GRIFFIN; TROY W. GRIFFIN; GLENN W. OLTMAN, as personal representative of the Estate of Inger Sue Arnold, deceased; and FARMERS & MERCHANTS INSURANCE COMPANY,	) ) ) ) ) ) ) ) ) )	ENTERED COLORDET DATE SEP 2 3 1997	
Defendants.	,		

## ORDER

This is an action for declaratory judgment, or in the alternative, for reformation, brought by Plaintiff, The Travelers Indemnity Company ("Travelers"). Travelers seeks a declaration that the Catastrophe Umbrella Policy, no. ISF-CUP-489W082-3-IND-95 ("Policy"), issued to Defendant, Shop and Save Market of Tulsa, Inc. ("Shop and Save"), does not cover damages sustained by Defendant, Freida B. Griffin ("Freida"), in a vehicular accident with Inger Sue Arnold ("Inger"). Travelers contends that Freida's damages are not covered by the Policy because Inger was not an insured under the Policy. However, even if Inger were an insured under the Policy, Travelers asserts that Freida's damages are not covered as the coverage limits of the primary insurance policy were



insufficient to trigger the Policy. In the event the Court should find coverage under the Policy for Freida's damages, Travelers requests the Court to reform the Policy so as to conform with the mutual intent of the parties. According to Travelers, the parties neither intended nor reasonably expected the Policy would provide coverage under the circumstances of this case.

Presently before the Court is the motion of Travelers for summary judgment. Also, before the Court is the cross-motion of Freida, Freida's husband, Defendant, Troy W. Griffin ("Troy"), and Defendant, Farmers & Merchants Insurance Company ("Farmers & Merchants"). Upon due consideration of the parties' submissions, the Court makes its determination.

The following facts are undisputed pursuant to the parties' Stipulation of Facts.

- 1. Shop and Save is an Oklahoma corporation. Jim Arnold is sole shareholder and president of the corporation.
- 2. At all times pertinent to this action, Jim Arnold and Inger were husband and wife.
  - 3. At the time of the vehicular accident, Inger owned no

Defendants, Glenn W. Oltman, personal representative of the Estate of Inger Sue Arnold, deceased, and Shop and Save Market of Tulsa, Inc., failed to respond to Travelers' summary judgment motion. The Court declines to deem the motion confessed as to these Defendants. The Court finds that summary judgment should be not granted in favor of Travelers for the reasons stated <u>infra</u>. And for the reasons stated <u>infra</u>., the Court finds that summary judgment is appropriate for Defendants and sua sponte grants summary judgment in their favor.

interest in Shop and Save. Although Inger had previously been employed by Shop and Save, she had not been an employee for the corporation for approximately 15 years. She was, however, listed on certain corporate records as vice president of Shop and Save.

- 4. On May 16, 1995, Inger was driving a 1992 Chevrolet Astrovan. Her vehicle struck a vehicle operated by Freida. Freida sustained injuries as a result of the vehicular accident.
- 5. Title to the 1992 Chevrolet Astro van was in the name of "Arnold, J or I dba Shop & Save." The vehicle was depreciated for taxes as a corporate asset of Shop and Save.
- 6. At the time of the vehicular accident, Jim Arnold and Inger had personal automobile insurance coverage for the vehicle through Liberty Mutual Fire Insurance Company, with a \$100,000.00 policy limit.
- 7. At the time of the vehicular accident, Freida and her husband owned two (2) policies of insurance with Farmers & Merchants, each providing uninsured motorist benefits with limits of \$100,000.00/\$300,000.00.
- 8. Travelers issued the Policy to Shop and Save, as named insured. It was in effect on the date of the vehicular accident.
- 9. At the time of the automobile accident, Inger was on an errand, which was not in any way related to the business of Shop and Save.
  - 10. After the vehicular accident, Freida and Troy brought

suit in the District Court of Tulsa County, Oklahoma against Inger and Farmers & Merchants, seeking recovery for personal injuries sustained by Freida in the automobile accident and the consequent loss of consortium suffered by Troy.

- 11. Inger subsequently died intestate (of causes unrelated to the vehicular accident) and Glenn Oltman was appointed by the Probate Division of the District Court of Tulsa County, Oklahoma as personal representative of her estate.
- 12. Liberty Mutual Fire Insurance Company has tendered its liability limit of \$100,000.00 to Freida and Troy. Farmers & Merchants has substituted this amount in accordance with Oklahoma law and has retained its rights of subrogation against Inger's estate. Farmers & Merchants has also tendered the full limits of its uninsured motorist coverage (\$200,000.00) with the agreement that Freida and Troy will return the uninsured benefits if the Policy applies.

Summary judgment should be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Where a reasonable trier of fact could not return a verdict for the nonmoving party, summary judgment is proper. White v. York Intern. Corp., 45 F.3d 357, 360 (10th Cir. 1995); Thomas v. International Business Machines, 48 F.3d 478, 484 (10th Cir. 1995).

Under Oklahoma law, unambiguous insurance contracts are construed, as other contracts, according to their terms. Plastering Company v. United States Fidelity and Guaranty Company, 912 P.2d 861, 869 (Okla. 1996). The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law. Id. Insurance contracts are ambiguous only if they are susceptible to two constructions. In interpreting an insurance contract, the court may not make a better contract by altering a term for the party's benefit. Id. The construction of an insurance policy should be a natural and reasonable one, fairly constructed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result. Dodson v. St. Paul Insurance Company, 812 P.2d 372, 376 (Okla. 1991) (quoting Wiley v. Travelers Ins. Co., 534 P.2d 1293, 1295 (Okla. 1974)). Neither forced or constrained constructed will be indulged, nor will any provision be taken out of context and narrowly focused upon to create and then construe an ambiguity so as to import a favorable consideration to either party than that expressed in the contract. Id.

Mindful of the rules of construction, the Court concludes that the Policy is unambiguous. The Court further concludes that Inger was an insured under the provisions of the Policy. The introductory portion of the Policy provides that "[t]he word 'insured' means any person or organization qualifying as such under

Section IV-WHO IS AN INSURED." Freida, Troy and Farmers & Merchants contend that Inger was an insured by virtue of Section IV(d). Section IV(d) provides in pertinent part:

With respect to the "auto hazard" each of the following is an insured:

(1) Any person or organization qualifying as an insured as respects "auto" liability in the "underlying insurance," other than those persons or organizations added as additional insureds by endorsement. . .

Section VIO of the Policy defines "auto hazard" as:

"Bodily injury". . .arising out of the ownership, maintenance or use of any "auto," but only for damages to which the "underlying insurance" would apply but for the exhaustion of its limits.

Section VI(b) of the Policy defines "auto" as ". . .a land motor vehicle. . . ."

Under Section VI(s), "underlying insurance" is defined as:

- (1) The policies listed in Item 6 of the Declarations, including any renewal or replacement of such policies; and
- (2) Any other insurance available to the insured except insurance purchased specifically to be either quota share with or excess of this policy.

Freida, Troy and Farmers & Merchants maintain that Inger was an insured under Section VI(d) because she was a person who qualified as an insured under the insurance policy issued by Liberty Mutual Fire Insurance Company and the insurance policy, which provided coverage for the 1992 Chevrolet Astro van, constitutes "underlying insurance" under Section IV(s). While Defendants acknowledge that the insurance policy was not a policy listed in Item 6 of the

Declarations, they contend that the insurance policy is "any other insurance available" to Shop and Save because it owned the 1992 Chevrolet Astro van covered by the insurance policy.

Upon review, the Court concurs with the position of Freida, Troy and Farmers & Merchants. It is undisputed that Shop and Save owned the 1992 Chevrolet Astro van. Indeed, the parties stipulated that the vehicle was depreciated for taxes as a corporate asset of Shop and Save. As Shop and Save had ownership of the vehicle, the Court finds that the insurance policy issued by Liberty Mutual Fire Insurance Company was "any other insurance available" to Shop and Save. The insurance policy therefore falls within the definition of "underlying insurance."

As the insurance policy issued by Liberty Mutual Fire Insurance Company constitutes "underlying insurance," the Court finds that Inger is an insured under the Policy by virtue of Section IV(d). It is undisputed that Inger was a named insured under the insurance policy issued by Liberty Mutual Fire Insurance Company. It is also undisputed that the insurance policy provided auto liability coverage for the vehicle. Inger therefore was a person "qualifying as an insured as respects "auto" liability in the 'underlying insurance.'"

In its reply brief, Travelers argues that even if Inger qualifies as an insured under the Policy, coverage under the Policy cannot be triggered until an additional \$900,000.00 in underlying

insurance coverage has been exhausted. According to Travelers, the "retained limit" provisions of the Policy provide that it will only afford coverage when the \$1,000,000.00 general aggregate identified within the "Underlying Policies and Limits" provision of the Declarations has been exhausted. In this case, the insurance policy of Liberty Mutual Fire Insurance Company only provides a \$100,000.00 liability limit. Travelers thus contends that the tender of such amount by Liberty Mutual Fire Insurance Company is insufficient to trigger coverage under the Policy.

Section I of the Policy provides that "[w]e will pay on behalf of the insured all sums in excess of the 'retained limit' that the insured becomes legally obligated to pay as damages because of 'injury' to which this policy applies. "Retained limit" is defined in Section VI(p) of the Policy as:

- (1) If the "underlying insurance" applies to the "injury," the greater of:
- (a) The total limit of insurance stated in item 6 of the Declarations; or
- (b) The "retained limit" shown in Item 5 of the Declarations.

Item 6 in the Declarations does not reference the underlying insurance policy at issue in this case. Rather, it references a general liability policy, no. 680-488W993A-95, which has no application to this case. The Court therefore concludes that subsection (a) does not apply. With regard to subsection (b), the retained limit shown in Item 5 is \$10,000.00. Because the

\$100,000.00 liability limit under the insurance policy is greater than \$10,000.00 and has been tendered by Liberty Mutual Fire Insurance Company, the Court finds that the coverage under the Policy has been triggered. The Policy thus provides coverage for the personal injuries sustained by Freida and the consequent loss of consortium suffered by Troy. Therefore, the Court finds that Freida, Troy and Farmers & Merchants are entitled to summary judgment on Travelers' claim for declaratory judgment set forth in Count I of the Complaint.

In Count II of the Complaint, Travelers alleges a claim for Travelers asserts that neither party to the Policy intended nor reasonably expected that the Policy would afford coverage to Inger under the circumstances of this case. motion, Travelers specifically relies upon the Oklahoma Supreme Court's recent decision in Max True Plastering Co., supra., to support it claim for reformation. The Oklahoma Supreme Court in that case adopted the doctrine of reasonable expectations with regard to construction of insurance contracts. This Court, however, finds the doctrine inapplicable to this case. In Max True Plastering, the Oklahoma Supreme Court stated that application of the doctrine is limited to situations in which the insurance policy contains an ambiguity or to contracts containing unexpected exclusions that arise from technical or obscure language or that are hidden in insurance policy provisions. As previously stated,

the Court finds the Policy unambiguous. Moreover, there is no allegation in this case of an unexpected exclusion in the Policy. The Court therefore finds that Travelers is not entitled to reformation. Consequently, summary judgment is appropriate on Count II of the Complaint.

Based upon the foregoing, Plaintiff Travelers Indemnity Company for Summary Judgment (Docket Entry #10) is **DENIED**.

Defendants Freida B. Griffin, Troy W. Griffin and Farmers & Merchants Insurance Company's Counter Motion for Summary Judgment is (Docket Entry #12) is **GRANTED**. Judgment shall issue forthwith.

ENTERED this 22 day of September, 1997.

MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

### IN THE UNITED STATES DISTRICT COURT FOR THE

### NORTHERN DISTRICT OF OKLAHOMA

## FILED

**ENTERED ON DOCKET** 

BANKERS STANDARD	)	SEP 22 1997
INSURANCE COMPANY,	) )	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	ý	
vs.	ý	Case No. 97-C-542-BU
BOBBY EUGENE CEARLEY,	)	

DATE SEP 2 3 1997\_

## ADMINISTRATIVE CLOSING ORDER

Defendant.

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within <u>30</u> days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this \_22 day of September, 1997.

MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE



## UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

Vs.

ANNIE BELL ELLIOTT,

Defendant.

Plaintiff,

SEP 1 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV730C(J)

#### NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C.

Lewis, United States Attorney for the Northern District of

Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant

United States Attorney, and hereby gives notice of its dismissal,

pursuant to Rule 41, Federal Rules of Civil Procedure, of this

action without prejudice.

Dated this 19th day of September, 1997.

UNITED STATES OF AMERICA

Stephen C. Lewis United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

### CERTIFICATE OF SERVICE

This is to certify that on the  $\frac{9}{4}$  day of September, 1997, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Annie Bell Elliott, 754 E. 48th St. North, Tulsa, Oklahoma 74126.

ssistant United States Attorney

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk U.S. DISTRICT COURT

GEORGIA MAY SELICA,	)	
Plaintiff,	) )	
vs.	) No. 97-C-643-B	
CARNIVAL CRUISE LINES, INC.,	)	
Defendant.	)	DATE SEP 2 2 1997
	ORDER	DATE

Defendant Carnival Corporation's ("Carnival") motion to dismiss came on for evidentiary hearing this date on the sole issue of whether Plaintiff Georgia May Selica ("Selica") received the Carnival Cruise Ticket contract containing the forum selection clause. At the hearing, Selica admitted receipt of the entire Carnival Cruise Ticket booklet, which included the forum selection clause. As the Court previously found that under the circumstances of this case Selica's receipt of the ticket contract containing the forum selection clause constitutes sufficient notice to enforce the provision, the Court concludes that the proper forum for Selica's claims lies in the State of Florida under that provision. Accordingly, the Court grants Carnival's motion to dismiss. (Docket No. 2).

ORDERED this 4 day of September, 1997.

UNITED STATES DISTRICT COURT

# IN THE UNITED STATES DISTRICT COURT FOR THE ILED

NORTHERN DISTRICT OF OKLAHOMA

SEP 22 1997

SHARON SHEARER,	)	Phil Lombardi, Clerk
Plaintiff,	)	U.S. DISTRICT COURT
vs.	)	Case No. 96-C-994-BU
SHEEHAN PIPE LINE CONSTRUCTION COMPANY,	)	
Defendant.	)	ENTERED ON DOCKET
Delendant.	1	DATE 9-22-97

## **JUDGMENT**

This action came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Sheehan Pipe Line Construction Company, and against Plaintiff, Sharon Shearer, and that Defendant, Sheehan Pipe Line Construction Company, recover of Plaintiff, Sharon Shearer, its costs of action.

Dated at Tulsa, Oklahoma, this 22 day of September, 1997.

MICHAEL BURRAGE

UNITED STATES DISTRICT /JUDGE

# IN THE UNITED STATES DISTRICT COURT FOR THE FILED

NORTHERN DISTRICT OF OKLAHOMA

SEP 22 1997

SHARON SHEARER,	Phil Lombardi, Clerk U.S. DISTRICT COURT
Plaintiff,	
vs.	) Case No. 96-C-994-BU
SHEEHAN PIPE LINE CONSTRUCTION COMPANY,	) )
Defendant.	) )

## ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, Sheehan Pipe Line Construction Company. Plaintiff, Sharon Shearer, has responded to the motion and Defendant has replied thereto. Based upon the parties' submissions, the Court makes its determination.

The relevant undisputed facts are as follows. Defendant is in the business of constructing pipe line at job sites across the United States. Defendant bids on construction jobs and when it is awarded a particular job, R. David Sheehan, Assistant Managing Partner, Bill R. Eddleman, Controller and appropriate other persons determine which personnel will be assigned to or employed for a particular job. Staffing decisions are based on considerations of job size, specific and/or unique job requirements and capabilities of the available personnel. The initial and

Fred Purvis is the former Controller and performed Mr. Eddleman's role for Defendant until his death in 1992.

primary staffing decision for any job is that of the position of Superintendent. The Superintendent has overall responsibility for the construction job, and supervises the work crews in the field. If the job requires an Assistant Superintendent, that position is next filled. After the Superintendent positions are filled, an Office Manager is selected for the job. The Office Manager is in charge of the field office administrative functions. Other office personnel, including Purchasing Agents, Payroll Clerks, and office clerks are thereafter selected based upon considerations of job size, issues unique to the job, and personality mix.

In most circumstances, the office staff for a job consists of the Office Manager and a Payroll Clerk. The Payroll Clerk is supervised by the Office Manager and his or her primary duty function is payroll. Sometimes a Payroll Clerk is assigned to open or close an office or to run a satellite office.

Defendant currently has approximately 48 full-time employees. All Superintendents are full-time employees; that is, all Superintendents are paid a weekly wage when assigned to a job and are paid "standby pay" when they are not assigned to a job. Currently, Office Managers also receive standby pay. Defendant annually sets standard wage rates for Superintendents, Office Managers, Purchasing Agents, Payroll Clerks and other personnel.

Defendant will generally hire and lay off between 1200 and 1500 additional employees to staff its jobs. At the conclusion of

a job, Defendant lays off all field personnel who are not regular employees and such persons are eligible to collect unemployment compensation. These persons may or may not be hired for the next job awarded to Defendant. Defendant occasionally hires persons to temporarily perform Office Manager functions.

The job site office consists of a mobile home converted into an office. Office staff generally work 10-12 hours per day and six days per week. It is Defendant's policy to avoid staffing jobs in a manner that would cause personal or professional discomfort to the Superintendent or other office staff.

Plaintiff became acquainted with R. David Sheehan sometime in the mid-1980's in her position as Cashier/Office Manager/Hostess for the Utica 21 Supper Club. After the Utica 21 Supper Club was sold, Plaintiff was hired as a Secretary at American Airlines in Tulsa. Mr. Sheehan then offered her a position with Defendant as a Payroll Clerk, with the "prospect" of advancing into the position of Office Manager.

In April, 1988, Defendant first employed Plaintiff and provided her with in-house Payroll Clerk training. She was then sent for further training as a Payroll Clerk to Larry Roetzel, who was Office Manager on a small job in Mississippi.

On this job, Plaintiff developed a personality conflict with the Superintendent, Dwayne Barber, and complained to Mr. Sheehan about it. Mr. Sheehan investigated her allegations and determined them to be without merit. However, he determined Plaintiff would not be employed on a job where Mr. Barber was a Superintendent.

Defendant again employed Plaintiff as a Payroll Clerk from approximately August to October of 1988 for a job in New Jersey. Lavon Ward was the Office Manager for that job. During the job, Plaintiff developed a romantic relationship with Mr. Ward, who was at that time separated from his wife.

Plaintiff and Mr. Ward worked another job in Kingsville, Texas. At the conclusion of this job, Mr. Ward was assigned to a job in George West, Texas and Plaintiff followed him there. At the conclusion of that job, in late 1988, Plaintiff and Mr. Ward's relationship ended.

In early 1989, before job assignments had been made for the upcoming season, Mr. Ward told Fred Purvis that in consideration for his family's feelings, he would not be able to accept any assignment working with Plaintiff. Thereafter, Plaintiff was not assigned to jobs where Mr. Ward was selected as Office Manager.

In her deposition, Plaintiff testified under oath she was not more qualified than Office Managers, Ms. Fincham, Mr. Ryan, Mr. Ray, Mr. Roetzel or Mr. Ward and that she had no evidence she was as qualified as any particular Office Manager.

According to Plaintiff's testimony, she knew that she was discriminated against by Defendant as to the terms and conditions of her employment in April, 1988; 1989; 1990; February through June

1991; Summer through Winter 1992; 1993; 1994 and 1995. Plaintiff also testified that she knew she was paid Payroll Clerk wages, as opposed to Office Manager wages, on jobs from Summer through December 1989; August 1990; and Summer through Fall, 1992. She testified that she complained to management about the discrimination.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on January 18, 1996.

David Keith was first employed by Defendant in August, 1990 as a Payroll Clerk. He was offered an Office Manager position on standby pay in July, 1996. During his periods of employment with Defendant, Mr. Keith was paid Payroll Clerk wages when he worked as a Payroll Clerk, when he was the sole office person in an office, when he closed an office, when he opened an office, and when he ran a satellite office.

Plaintiff has brought this action alleging that Defendant discriminated against her on the basis of gender in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.("Title VII"). Plaintiff specifically alleges that because she was a woman, she suffered the consequences of her 1988 affair with Mr. Ward in that she was not assigned to construction jobs while Mr. Ward was. She also alleges that Defendant failed to provide her with standby pay like other Office Managers. She also asserts a claim under the Equal Pay Act, 29 U.S.C. § 206(d),

alleging that she was not paid wages for performing Office Manager duties equal to those paid to men performing substantially equal work.

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1970). Once the moving party has met its burden, the opposing party must come forward and identify sufficient evidence to require submission of the case to a jury. The Court views the evidence in a light most favorable to the opposing party. Jones v. Unisys Corp., 54 F.3d 1357, 1361 (10th Cir. 1995).

Initially, the Court finds that Plaintiff's Title VII claims of discrimination from 1989 until March, 1995 are time-barred. According to 42 U.S.C. § 2000e-5(e), a charge of discrimination must be filed within 300 days after the alleged unlawful practice occurs.<sup>2</sup> This filing is a prerequisite to a civil suit under Title

The 300 day limitation applies in those states that have statutorily prohibited racial discrimination. Otherwise the limit is 180 days.

VII. In the instant case, the EEOC charge was submitted by Plaintiff on January 18, 1996. Clearly, Defendant's alleged employment acts of failing to assign her to construction jobs due to her romantic relationship with Mr. Ward and failing to provide her with standby pay like other Office Managers from 1989 until March, 1995 fall outside the 300 day time period.

The Court notes that the Tenth Circuit has recognized the "continuing violation" doctrine, which permits a VII plaintiff to challenge incidents that occurred outside the statutory time limitations if such incidents are sufficiently related to events which occurred during the time limitations period and thereby constitute a continuing pattern of discrimination. Mascheroni v. Board of Regents of the Univ. of Calif., 28 F.3d 1554, 1560 (10th Cir. 1994). In order for this doctrine to apply, however, there must be at least one instance of the discriminatory practice within the filing period for the doctrine to apply and the earlier acts must be part of a continuing policy or practice that includes the act or acts within the statutory period. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 (10th Cir. 1993). The discriminatory act occurring within the time period need not constitute a legally sufficient Title VII claim in itself. Id. at 1415 n. 5. However, the plaintiff cannot simply assert that the acts occurring outside the required time period had a continuing effect within the statutory time. Id. at 1415.

To establish a continuing violation, Plaintiff must show that Defendant engaged in a series of related discriminatory acts, at falls within the limitations period. one of which Mascheroni, 28 F.3d at 1561. To determine whether the alleged incidents of discrimination constitute a continuing violation or are discrete unrelated acts, the Court must employ a three-factor inquiry: "'(1) subject matter--whether the violations constitute the same type of discrimination; (ii) frequency; and permanence--whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.'" Id. (quoting Martin, 3 F.3d at 1415.

Upon review of the record, the Court finds that Plaintiff cannot satisfy the first prong of the three-factor test. Plaintiff has failed to present evidence of a discriminatory act which occurred within the statutory time period and which was part of the continuing violation. Specifically, Plaintiff has not presented any evidence to show that after March 1995, she was not assigned to a position on a construction job due to her romantic relationship with Mr. Ward. While Plaintiff has made allegations in her response brief that she only worked six (6) weeks in 1995, she has provided no admissible evidence to show that she only worked that amount of time because of her relationship with Mr.

Ward. Additionally, Plaintiff has not cited to any specific job available during the limitations period for which she was qualified and was denied the position. Plaintiff has also not presented any evidence to show that Mr. Ward was the only Office Manager who worked all of the construction jobs awarded to Defendant during the limitations period. The record reflects that there were several permanent Office Managers employed by Defendant, one of which was a female.

As to standby pay, Plaintiff alleged in her charge of discrimination filed with the EEOC that she was subjected to unequal wages on or before November 1, 1995. Although the evidence shows that Plaintiff performed certain Office Manager duties on certain jobs, including opening and closing an office and running a satellite office, and was not paid standby pay, the evidence similarly shows that David Keith, a male, performed substantially the same duties and did not receive standby pay. Plaintiff thus cannot prove her prima facie case, as discussed below, that she was treated differently than her male counterparts. Therefore, inasmuch as Plaintiff cannot identify a discriminatory act within the limitations period and that was part of a continuing violation, Plaintiff cannot establish the first prong of the three-factor test. Mascheroni, 28 F.3d at 1562.

In addition, the Court finds that Plaintiff cannot satisfy the third prong of the three-factor test; that is, permanence. The

Court concludes that the challenged employment acts of Defendant prior to March, 1995 were sufficient to trigger Plaintiff's awareness of and duty to assert her rights under the law. In fact, the undisputed evidence in the record reveals that Plaintiff was aware that Defendant had allegedly violated her rights as early as Plaintiff's deposition testimony reveals that in 1989 she was specifically aware of discrimination in the conditions of her employment as a result of her relationship with Mr. Ward. Plaintiff's testimony further reveals that she was aware that she was not paid standby pay in August, 1989. However, even this testimony were to be disregarded, Plaintiff's own unsubstantiated allegations indicate that she told Mr. Sheehan in 1993 that she had been excluded from assignments because of her romantic relationship with Mr. Ward and that she entitled to standby pay. By her own allegations, then, Plaintiff had 300 days from the date of her conversation with Mr. Sheehan to file her charge with the EEOC. However, rather than file her charge by October of 1994, Plaintiff delayed the filing of her charge until January 18, 1996. Because Defendant's alleged acts were sufficient to alert Plaintiff to a violation of her rights and did in fact alert Plaintiff to a violation of her rights, the Court finds that Plaintiff cannot rely upon the continuing violation doctrine to defeat the statute of limitations with respect to the alleged employment acts predating March, 1995.

The Court recognizes that Plaintiff may also invoke the continuing violation doctrine by showing the maintenance of a company-wide policy of discrimination both before and during the limitations period which evidences a pervasive, institutionalized "system" of discrimination. Purrington v. University of Utah, 996 F.2d 1025, 1028-1029 (10th Cir. 1993). However, even assuming Defendant's decision not to assign Plaintiff to construction jobs with Mr. Ward constituted a company-wide policy and evidenced a "pervasive institutionalized system of discrimination," the Court finds that Plaintiff has failed to show that any application of that policy during the limitations period. Plaintiff has identified no specific job to which she was denied a position during the limitations period due to the relationship with Mr. Ward. As to Defendant's admitted policy of considering personality mix in the assignment of personnel, the Court finds that such policy is facially neutral and to the extent that it had a disparate impact on women, it constituted a single violation of Title VII triggering the statute of limitations. Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 912 n.5 (1989). Consequently, Plaintiff cannot invoke the continuing violations doctrine to challenge Defendant's alleged employment practices prior to March, 1995. Those employment practices are therefore barred time-barred.

Even if the earlier acts were not time-barred, the Court finds that Defendant is entitled to summary judgment on Plaintiff's Title

VII claim. In order to establish a prima facie case of gender discrimination, a plaintiff must prove that (1) she belongs to a protected class, (2) she was qualified for the job; (3) despite her qualifications, she suffered adverse employment action, and (4) she was treated less favorably than her male counterparts. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1380 (10th Cir. 1994). If the plaintiff establishes a prima facie case, the defendant can rebut the presumption of discrimination by producing some evidence that it had legitimate, nondiscriminatory reasons for its action. Sorensen v. City of Aurora, 984 F.2d 349, 352 (10th Cir. 1993). If the defendant meets its burden of production, then the plaintiff must show that there is a genuine issue of material fact as to whether the employer's proffered reason for the challenged action is pretextual—i.e. unworthy of belief. Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995).

Upon review of the record, the Court, as previously stated, finds that Plaintiff cannot establish a prima facie case of discrimination in regard to standby pay. Specifically, Plaintiff cannot show that she was treated differently than her male counterparts. The undisputed evidence shows that David Keith, a male, performed similar Office Manager duties and was not given standby pay.

As to job assignments, the Court finds that Plaintiff has failed to raise a genuine issue of fact that Defendant's legitimate

nondiscriminatory reasons for its employment decision were a pretext for discrimination. Plaintiff does not dispute that Defendant considered personalities and potential personal conflicts when staffing a job. She also does not dispute that persons were assigned to jobs from the top down; i.e. the choice of an Office Manager depends upon the Superintendent assigned; the choice of a Payroll Clerk depends upon the Office Manager. All employees, men and women, were subjected to the same policy. Indeed, the evidence shows that the policy was applied to Plaintiff in that because of a personality conflict, she was not put on construction jobs where Dwayne Barber was Superintendent. Plaintiff also has not presented any evidence to show that she was equally or more qualified that Lavon Ward and the other regular Office Managers for the jobs to which they were assigned during the years in question. Plaintiff states in her response brief that she was the only Officer Manager who was not consistently placed in jobs and cites to testimony of Mr. Sheehan in regard to a 1992 job that "the fact Lavon [Ward] was there had an impact on where I could put Sharon [Shearer]." Notably, however, there is no evidence in the record to show that Mr. Ward was placed on every construction job awarded to Defendant. Defendant had several regular Office Managers who were assigned to construction jobs. Even though Defendant applied its policy to Plaintiff, there is no evidence that this policy excluded her from construction jobs involving other Office Managers or construction jobs to which Mr. Ward was not assigned. As to the 1992 job, the Court notes that Plaintiff was placed in the satellite office and thus was not precluded from employment due to her relationship with Mr. Ward.

In addition to her Title VII gender discrimination claim, Plaintiff, as stated, has alleged a claim under the Equal Pay Act. Specifically, Plaintiff alleges that she was paid less for her performance of Office Manager duties than males who performed substantially equal work.

To establish a prima facie case under the Equal Pay Act, Plaintiff must prove that: (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; and (3) the male employees were paid more under such circumstances. Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir. 1993).

If a prima facie case is established, Defendant must prove that there existed one of the following reasons for the wage disparity: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; (4) a disparity based on any factor other than sex. Id. If a defendant fails to convince the jury with its evidence of one or more of the "affirmative defenses," listed above, Plaintiff will prevail on her

prima facie claim. Id.

Upon review of the evidence, the Court finds that Plaintiff cannot establish a prima facie case. Plaintiff claims that when she performed certain Office Manager duties she was compensated less than her male counterparts. The Office Manager duties included: (1) running a satellite office by herself; (2) setting up an office by herself, and (3) closing an office by herself. The undisputed evidence reveals that David Keith, a male, performed substantially equal jobs to Plaintiff's with equal compensation. Indeed, the evidence shows that Mr. Keith, like Plaintiff, ran satellite offices, closed and opened offices and was paid the same wages as Plaintiff. Because the undisputed evidence shows that Plaintiff was not paid less than male employees for "substantially equal work," her prima facie case fails and summary judgment is appropriate.

Based upon the foregoing, the Motion for Summary Judgment filed by Defendant, Sheehan Pipe Line Construction Company (Docket Entry #13) is GRANTED. Judgment will issue forthwith. In light of the Court's ruling, Defendant's Motion in Limine (Docket Entry #15) is DECLARED MOOT.

ENTERED this \_22 day of September, 1997.

MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE